

89-1568

(2)

Supreme Court, U.S.

FILED

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JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

ARTHUR CHAMBLESS and
MILDRED H. CHAMBLESS,

Petitioners,

— against —

MASTERS, MATES & PILOTS PENSION PLAN, et al.,

Respondents.

**APPENDIX TO A PETITION
FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

ARTHUR M. WISEHART
Counsel of Record
WISEHART & KOCH
Attorneys for Petitioners
25 West 43rd Street
New York, New York 10036
(212) 730-0044

Of Counsel:
RUSSELL G. PELTON

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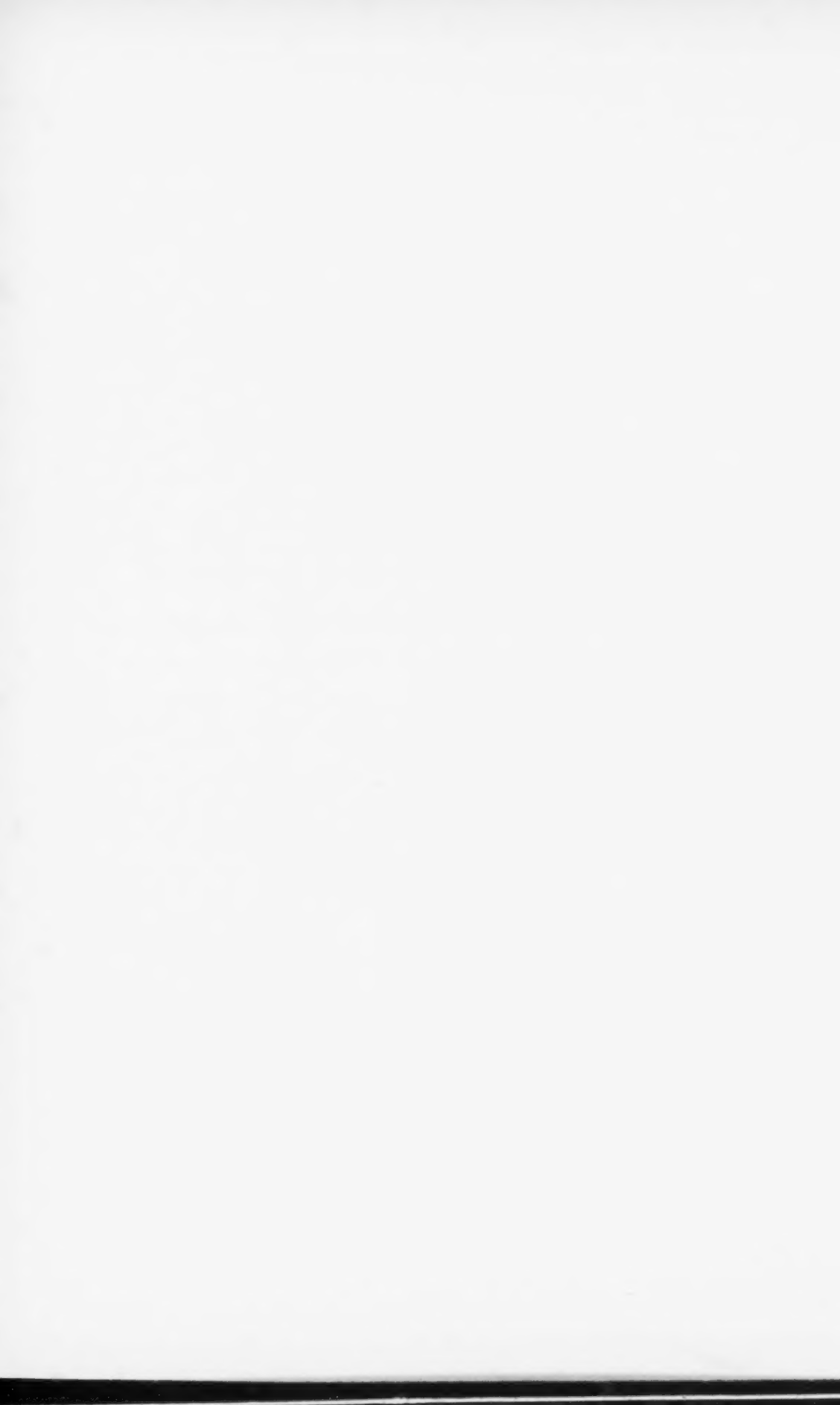
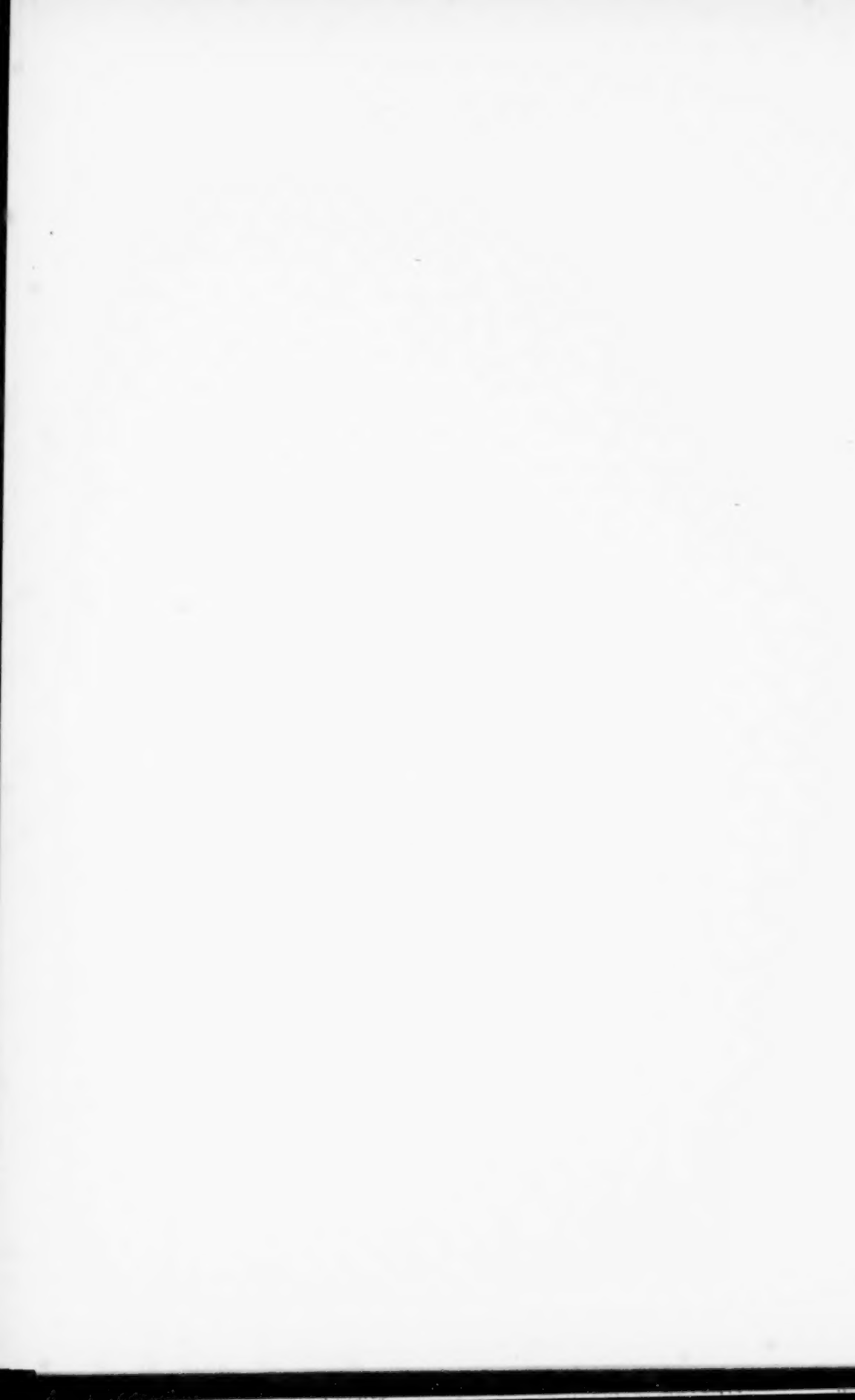


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1071, 1223—August Term, 1988

(Argued May 9, 1989 Decided September 12, 1989)

Docket Nos. 88-7892, 88-7928

ARTHUR M. CHAMBLESS and MILDRED H. CHAMBLESS,
Plaintiff-Appellants, Cross-Appellees,

—v.—

MASTERS, MATES & PILOTS PENSION PLAN, STEPHEN
P. MAHER, Administrator of the Masters, Mates &
Pilots Pension Plan, C.J. BRACCO, RICHARD M. CAS-
SELBERRY, MICHAEL DI PRISCO, E. GRAS, GEORGE
GROH, JUSTIN GROSS, JAMES R. HAMMER, JAMES J.
HAYES, MARTIN F. HICKEY, CHARLES JESS, FRAN-
CIS E. KYSER, CHARLES LANDRY, ORION A. LAR-
SON, ROBERT J. LOWEN, LLOYD MARTIN, J. ERIC
MAY, DAVID MERRITT, THOMAS E. MURPHY,
HENRI L. NEREAUX, WILLIAM OTT, MARTIN PECIL,
FRANKLIN J. RILEY, JR., WILLIAM I. RISTINE, A.C.
SCOTT, CAPTAIN JOHN SMITH, RUPERT SORIANO,
ERNEST SWANSON, MICHAEL SWAYNE, ALLEN TAY-
LOR, NICHOLAS TELESMANIC, KENNETH P. WEN-
THEN, C.E. WITCOMB, in their fiduciary capacity as
Trustees of the Masters, Mates & Pilots Pension Plan,
Defendants-Appellees, Cross-Appellants.

Before:

KEARSE, CARDAMONE, and PIERCE,
Circuit Judges.

Plaintiff-appellants, cross-appellees, Arthur M. Chambless and Mildred H. Chambless, appeal the amount of attorney's fees their counsel received pursuant to the September 16, 1988 judgment and October 19, 1988 endorsement order of the United States District Court for the Southern District of New York (Carter, J.). Defendants-appellees Master, Mates & Pension Plan, its administrators and trustees, cross-appeal the district court's July 20, 1988 order which awarded plaintiffs actuarially-adjusted pension benefits. We affirm the amount of attorney's fees with the exception of paralegal fees. We reverse the award of the de facto retroactive pension benefit and remand for an award of the correct amount of benefits, and for an award of paralegal fees consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

ARTHUR M. WISEHART, New York, New York
(Russell G. Pelton, Wisehart & Koch, New York, New York, of counsel),
for appellants.

BETTINA B. PLEVAN, New York, New York
(Joseph Baumgarten, Proskauer Rose

Goetz & Mendelsohn, New York, New York, of counsel), *for appellees*.

CARDAMONE, *Circuit Judge*:

The litigation that brings this appeal before us began nine years ago in 1980. The case has wended its way into our Court twice before. On this third visit, two overarching issues are presented: Whether the district court's award of actuarially-adjusted benefits is the equivalent of an award of retroactive benefits, inconsistent with our prior ruling in this case; and, whether the district court abused its discretion in calculating the amount of attorney's fees that plaintiffs' counsel may recover.

With respect to the first issue, we earlier ruled that appellant was not entitled to recover retroactive benefits. On remand, the district court awarded appellant actuarially-adjusted benefits, which amounts to exactly the same thing. The attorney's fees issue, attendant upon the benefits suit, has like Frankenstein's monster taken on a life of its own and threatens to become a second major litigation, despite the Supreme Court admonishment against such happening. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). This is the sixth opinion to be published in this case; we think it should be the last.

I FACTS

In light of the above, we may safely assume familiarity with the factual background and prior proceedings, and set forth only those facts necessary to identify the parties, the dispute and its procedural posture.

The appellant is Arthur M. Chambless, a licensed deck officer in the United States Merchant Marine. He became a member of the International Organization of Masters, Mates & Pilots (union) in 1944. The union negotiated a multi-employer-funded pension plan (Plan) for deck officers working for shipping companies that are signatories to the Plan. The Plan, its administrators, and its trustees are the remaining defendants.

Chambless complained that the union hastened the early retirement of its older members by assigning them to low-paying jobs. He sought early retirement from the union in April of 1977 and went to work for a ship that was not owned by a signatory to the Plan. As a result, the union informed him that he was no longer in good standing. Citing newly enacted Plan Amendments 46 and 47, the Plan's administrator notified Chambless that because he continued to work for a non-signatory ship, he had not truly retired, was not entitled to a union pension at that time, and could not receive his pension under the Plan until 1986 when he would be 65 years old.

The Plan provides monthly wage-related retirement benefits for employees with service of 30 years or longer equal to the greater of either \$470 or 60 percent of pay. Pay is defined by looking to the highest-paying five consecutive years in the 10 years immediately preceding retirement. The Plan therefore informed Chambless that when he retired, his monthly benefit would be \$470 per month rather than the approximately \$970 per month he would have received if he had been allowed to retire in 1977, when his pension would have been calculated using 1967-77 as base years—the period when his income was at its zenith.

The tortuous procedural history of this case began in 1980 when Chambless and his wife as plaintiffs brought suit against defendants, *inter alia*, the union, the Plan, and Chambless' former employers. Essentially, the complaint alleged that because Chambless had worked for a non-Plan ship, the Plan had discriminatorily forfeited his pension, causing him to receive \$470 at age 65 rather than \$920 at age 55. Chambless asserted a plethora of claims including violations of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (1982) (ERISA), antitrust violations, waiver and estoppel, breach of duty of fair representation, infliction of emotional distress, and breach of fiduciary duty.

Many of appellant's claims and several named defendants were dismissed following cross-motions for summary judgment. *See Chambless v. Masters, Mates & Pilots Pension Plan*, 571 F. Supp. 1430, 1459-60 (S.D.N.Y. 1983) (*Chambless I*). At trial, several more causes of action were dismissed at the close of plaintiffs' case, leaving only the issue of whether the Plan trustees, in applying Amendment 47 of the Plan, had violated ERISA when they caused Chambless to forfeit his pension until age 65. Ruling that the postponement and reduction of Chambless' benefits was arbitrary and capricious, the district court declared the forfeiture a nullity. It directed the trustees to approve Chambless' application for retirement—once he ceased working in the maritime industry—and to “treat the application as if it had been made in 1977 and grant him a wage related pension based on his 1967-1977 employment record.” 602 F. Supp. 904, 913 (S.D.N.Y. 1984) (*Chambless II*). We affirmed and remanded “for a determination of the benefits which Chambless would have received in 1977.” 772 F.2d 1032, 1043 (2d Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986) (*Chambless III*).

Chambless' counsel then moved for attorney's fees pursuant to § 502(g) of ERISA, 29 U.S.C. § 1132(g). The district court denied the request on the grounds that plaintiff's "vexatious[] and wasteful[] litigation strategy" outweighed his success on the ERISA claim. It also denied plaintiff's motions to amend the judgment to state the amount of his benefits. No. 80 Civ. 4258 (RLC) (S.D.N.Y. June 23, 1986). We affirmed the district court's refusal to amend its judgment before the benefits had commenced on the grounds that the motion was premature, but reversed and remanded for the district court to "determine and award a reasonable fee for the time spent on Chambless' vindicated ERISA claim." 815 F.2d 869, 872 (2d Cir. 1987) (*Chambless IV*). Further, we stated that since Chambless had, on September 1, 1986, begun to receive his benefits, any dispute he might have regarding the amount of his pension was ripe for presentation to the district court "to determine whether Chambless is now receiving benefits in the amount to which he is entitled." *Id.* at 873.

That brings us to the decisions that we now review. As the opinion of the district court with which we disagree is unpublished, we set forth its conclusions in some detail. *See Chambless v. Master, Mates & Pilots Pension Plan*, No. 80 Civ. 4258 (S.D.N.Y. July 20, 1988) (Carter, J.) (Decision). The district court awarded Chambless an actuarially-adjusted pension in the amount of \$2,689.02 per month. It also awarded plaintiff's counsel \$416,191.30 in attorney's fees for work related to the claim upon which Chambless had prevailed.

Initially, Chambless had characterized his complaint as a "seamless web," *see Chambless IV*, 815 F.2d at 872, and had requested fees of approximately \$1.5 million for *all*

legal work. Plaintiff then reduced this request by 25 percent to eliminate such claims as were clearly unrelated to the theory upon which he had prevailed. In calculating the fee, the district court found some of the submitted time sheets cryptic to the point of uselessness and accordingly reduced plaintiff's requested fee by 15 percent to "ensure that the fee award excludes inadequately documented expenditures of time." But Judge Carter concluded that the fee request was still excessive; Chambless' voluntary 25 percent reduction did not go far enough to eliminate work on claims unrelated to the favorable award. The district judge therefore reduced the fee by an additional 15 percent. As a result, Chambless' initial fee application was reduced by a total of 55 percent: 25 percent by Chambless himself, and court reductions of 15 percent for inadequate documentation and 15 percent to exclude time spent on unrelated claims.

To calculate an hourly rate for Chambless' attorneys that reflected both inflation and delayed payment because of the protracted history of the case, the district court divided the litigation into two time periods subject to different hourly rates, but declined to add interest to the award on the grounds that its rates for the earlier hours were generous enough to compensate for the time that elapsed since the services had been rendered. The hourly rates for both time spans were what the district court determined to represent the market rate for small to medium-sized firms. In addition, the fee calculation reimbursed Chambless' attorneys for the payroll cost of paralegals and law clerks rather than their customary billable hourly rate, which plaintiff had sought. This portion of the award was similarly reduced by 30 percent for inadequate documentation and unrelated claims.

Turning to Chambless' pension benefits, the court denied his request for post-1977 cost-of-living adjustments on the grounds that the Plan allows such increases only to actual benefit recipients. As a result, plaintiff could not receive cost-of-living adjustments for years before he retired when he was not yet a recipient. Significantly, the district court accepted Chambless' argument that his benefits should be actuarially adjusted to reflect the fact that his life expectancy was shorter when he began receiving benefits in 1986 than when he attempted to retire in 1977. Such an increase, the district court concluded, was not the functional equivalent of retroactive benefits. The district court therefore set Chambless' benefits at \$2,689.02, or approximately three times the amount he would have received in 1977.

After plaintiff had accepted the district court's invitation to make certain other submissions, including a supplemental fee application, the district court, upon reargument, fine-tuned plaintiff's fee award to \$451,990.50, but rejected all other arguments. 697 F. Supp. 642, 649-50 (S.D.N.Y. 1988) (*Chambless V*) (September 16, 1988 judgment). Plaintiff's second supplemental fee application was denied in an endorsement order of October 19, 1988. The judgment was amended on January 11, 1989 to allow plaintiffs to recover their costs, and on March 15, 1989 the district court denied defendants' motion to delete plaintiff's cost award from the amended judgment. Chambless appeals the amount of attorney's fees awarded his counsel. The union cross-appeals the amount of the Chambless' actuarially-adjusted pension benefits. We affirm Judge Carter's award of attorney's fees, except for the amount granted for paraprofessional services, and reverse the pension benefits award. We dis-

cuss first the pension award and then the attorney's fees award.

II DISCUSSION

A. *Chambless' Benefits*

This discussion assesses the propriety of the district court "actuarially adjusting"—more than tripling—Chambless' monthly benefits from \$859.43 to \$2,689.02.

It is axiomatic that once a court of appeals decides a question, the district court must follow that ruling upon remand. *See Doe v. New York City Dept. of Social Servs.*, 709 F.2d 782, 788 (2d Cir.), *cert. denied*, 464 U.S. 864 (1983). Similarly, under the doctrine of law of the case we too must generally adhere to the earlier panel's ruling. *See id.* at 789 (collecting cases). The clarity of our prior holding in *Chambless III* speaks for itself: "[T]he district court was correct in not awarding retroactive benefits but instead requiring the Plan to pay Chambless, upon his retirement, the monthly amount he would have received had he retired in 1977." 772 F.2d at 1042 (emphasis added). Because the district court upon remand bestowed retroactive benefits or their equivalent, that judgment must be reversed.

In its July 20 opinion, the district court recognized "the undisputed fact" that Chambless may not receive retroactive benefits. Nonetheless, it awarded the economic equivalent, labeling it "actuarial adjustment" rather than "retroactive benefit," as if the two were distinct, like apples and oranges. It attempted to sharpen its distinction by noting that an actuarial adjustment

would not alter the total amount of pension benefits to which [Chambless] is entitled over the course of his

expected lifetime. It would merely recognize that that amount will now be payable over a shorter period of time. Thus, viewed from the perspective of his total projected lifetime benefits, the adjustment plaintiff seeks would not increase his benefits.

Decision at 37.

We have no quarrel with the observation that a 65-year-old has a shorter life expectancy than a 55-year-old. But the fallacy in the July 20 opinion is its underlying assumption that Chambless was entitled to a set sum—evidently based on life expectancy—regardless of how long he was on the Plan's pension rolls. Based on this erroneous premise, the district court compensated Chambless believing that because he would be paid for a shorter period of time, the amount of each payment should be increased. Chambless has not pointed to, nor have we found, a section of the Plan regulations that specifically or even implicitly suggests that claimants must receive a given total amount of benefits. As Chambless is not entitled to a specific total sum, obviously no adjustment is necessary to make sure that he receives such an award.

In addition, the district court erred by focusing on how and when the benefits were paid to Chambless—apparently defining “retroactive benefits” to mean a lump sum payment for benefits previously withheld. But the reason we disallowed retroactive payments had nothing to do with whether or not they were paid at once. We recognized previously that Plan pensioners cannot receive retirement benefits until they actually retire; Chambless did not retire from the maritime industry until 1986. *See Chambless III*. This was the rationale for denying plaintiff retroactive payments, defined as payments for the years 1977-86. Payments that *in any way* compensate Chambless

for the years 1977-86 are retroactive benefits—regardless of how they are labeled—and regardless of whether Chambless receives them in one lump sum in 1986 or, as the district court directed, in monthly installments after 1986.

Accordingly, the district court should enter judgment directing the Plan to provide Chambless with a monthly benefit of \$859.43 per month, the amount he would have received under the husband and wife pension plan option had he been allowed to retire in 1977. We affirm Judge Carter's ruling that now that Chambless has begun to receive benefits, he is entitled to whatever cost-of-living adjustments the Plan has awarded other recipients from the date of his application in October of 1986. Because the adjustment to Chambless' benefits was incorrect, the issue of whether plaintiff should be awarded interest on that adjustment is moot.

B. *The Amount of Attorney's Fees*

We note at the outset that our scope of review on an award of attorney's fees is circumscribed. An assessment of such an award entails a detailed *ad hoc* inquiry into the particular case. See *Blanchard v. Bergeron*, 109 S. Ct 939, 946 (1989) ("It is central to the awarding of attorney's fees . . . that the district court judge, in his or her good judgment, make the assessment of what is a reasonable fee under the circumstances of the case."). Having tried the case, the district court has the best vantage point from which to assess the skill of the attorneys and the amount of time reasonably needed to litigate a case. Therefore, its calculation of attorney's fees will not be disturbed absent an abuse of discretion. See, e.g., *Hensley v. Eckerhart*, 461 U.S. at 437; *In re "Agent Orange" Prod. Liab. Litig.*,

818 F.2d 226, 237 (2d Cir.), *cert. denied*, 108 S. Ct. 289 (1987).

With the exception of reimbursement for paraprofessionals necessitated by a recent Supreme Court case to be discussed below—rendered after Judge Carter’s opinion—we cannot say there has been an abuse of discretion. Hence, Judge Carter’s rulings on attorney’s fees and costs are affirmed in all other respects for substantially the reasons stated in his exhaustive opinions of July 20, 1988 and September 16, 1988. But we take this opportunity to add a few comments.

1. *Reimbursement for Paralegals and Law Clerks*

The district court awarded appellant’s attorneys the payroll cost—rather than the customary billing rates—for paralegals and law clerks who worked on this litigation. This allowed counsel to break even—but without making a profit—for its use of paraprofessionals. In focusing on cost rather than the prevailing market rate, the district court properly followed our holding in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 473 (2d Cir. 1974), that the prevailing attorneys “must be reimbursed for [paralegals’] wages even though their time cannot be considered as input in the fee award determination.”

Chambless argued that *Grinnell* was no longer good law, relying on *United States Football League v. National Football League*, 704 F. Supp. 474 (S.D.N.Y. 1989). Appellant’s assertion of *Grinnell*’s demise initially appeared premature, but it subsequently proved prescient. While this appeal was *sub judice*, the Supreme Court decided *Missouri v. Jenkins*, 57 U.S.L.W. 4735 (U.S. June 19, 1989), under the Civil Rights Attorney’s Fees Awards

Act of 1976, 42 U.S.C. § 1988 (1982). Although this is not a § 1988 case, the Supreme Court instructs us that the same standards apply to other fee-shifting statutes where an award is made to the prevailing party. See *Hensley*, 461 U.S. at 433 n.7.

In *Jenkins* the High Court ruled that a reasonable attorney's fee should be calculated to reimburse paralegals at market rates rather than cost, where that is the custom of the local legal community. The Supreme Court noted that "separate billing [for paralegals] appears to be the practice in most communities today." 57 U.S.L.W. at 4739. Because it was constrained at the time by *Grinnell*, the district court did not make a finding on whether New York law firms typically bill paralegals at hourly rates. Accordingly, we must remand for a finding on that issue; if that is the prevailing practice among New York firms, and direct the district court to award Chambless' attorneys reimbursements for paralegal time in accordance with *Missouri v. Jenkins*.

2. Setting Plaintiffs' Hourly Rate by Reference to Small to Medium Firms

After determining the number of hours reasonably needed to litigate the prevailing case, the district court under the "lodestar" analysis ascertained a reasonable rate by which to multiply the number of hours. The Supreme Court has stated that awards of attorney's fees must be calculated according to "the prevailing market rates in the relevant community" *Blum v. Stenson*, 465 U.S. 886, 895 (1984). Chambless argues that the district court violated this mandate when it set the hourly rates for the lodestar calculation by reference to small to medium-sized firms. We do not think the above-quoted

language from *Blum v. Stenson* compels district courts to assign the same hourly rate to every law firm in the same city. On the contrary, under the *Blum v. Stenson* formulation, the district court must ascertain whether “the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.” *Id.* at 896 n.11 (emphasis added). Thus, as the district court implicitly recognized, several market rates may prevail in a given area, particularly one with as large and diverse a legal community as New York City.

The burden was on Chambless to establish his hourly rate with “satisfactory evidence—in addition to the attorney’s own affidavits” *Id.*; see also *Hensley*, 461 U.S. at 437. The primary evidence that Chambless provided on this issue—aside from affidavits of his attorneys—was an article in the *Manhattan Lawyer* that listed billing rate increases for 14 large firms in New York City, including the firm that represented the union, but not including Chambless’ firm. The district court found this evidence “meager,” and properly accorded it little weight. See *Miele v. New York State Teamsters Conf. Pension & Retirement Fund*, 831 F.2d 407, 409 (2d Cir. 1987) (district judge may rely in part on his or her own knowledge of hourly rates charged in community and is not limited to the submitted evidence of prevailing rates).

Moreover, the *Manhattan Lawyer* article itself supports the proposition that smaller firms may be subject to their own prevailing market rate. See *Manhattan Lawyer*, May 11, 1987, at 31, col. 1 (“Raising rates has been trickier for mid-sized and smaller firms because blue-chip clients frequently turn to them thinking they’ll get lower bills.”). In light of plaintiff’s proffered evidence, it is hardly surpris-

ing that the district court chose to interject its own knowledge.

3. *Fee Parity*

We are similarly unpersuaded by Chambless' demand for "fee parity" with the Plan's counsel—a "large" firm, which was paid under an insurance policy. *See Sokolowski v. Aetna Life & Casualty Co.*, 670 F. Supp. 1199 (S.D.N.Y. 1987). In essence, appellant contends that his attorneys should be paid as much as the union's attorneys. We agree with the district court that the prevailing market rate test does not mandate equal fees for opposing counsel. *See Chambless V*, 697 F. Supp. at 646.

Further, in the circumstances of this case, the fees the Plan paid its counsel are not particularly helpful in setting a reasonable rate for Chambless' attorneys. The two parties had entirely different stakes in the litigation. Chambless brought the suit primarily to recover his own individual Plan benefits, even though he achieved a broader effect. The Plan, in contrast, is composed of numerous participants like Chambless, and it had already been the defendant in a class action suit that raised issues analogous to those raised in the instant litigation. *See Sokolowski*, 670 F. Supp. at 1201-02. Doubtless the Plan considered the *res judicata* potential of Chambless' complaint when it structured its defense. Accordingly, even though Chambless' and the Plan's attorneys were arguing about two sides of the same coin, the difference in the precedential value of the case to their respective clients could vary markedly and could well justify a divergence between the fees they charged. *See Johnson v. University College of the Univ. of Ala.*, 706 F.2d 1205, 1208 (11th Cir.), *cert. denied*, 464 U.S. 994 (1983); *Mirabal v. Gen-*

eral Motors Acceptance Corp., 576 F.2d 729, 731 (7th Cir.) (per curiam), *cert. denied*, 439 U.S. 1039 (1978).

There may be instances when district courts will want to consider—among the myriad of other factors—the fees charged by opposing counsel. *Cf. Taylor v. Scarborough*, 66 F.2d 589, 591 (2d Cir. 1933) (in attorney's suit for lien for services rendered, opposing counsel's fees were persuasive though not conclusive). But here, what the Plan's counsel charged was irrelevant for calculating a reasonable fee for Chambless' attorneys, and it was not an abuse of the district court's discretion to decline to match appellant's attorney's fees to those of his adversaries.

4. *Delay in the Payment of Fees*

To spare the parties yet a fourth appeal to this Court, we acknowledge the observation in *Missouri v. Jenkins* that "an appropriate adjustment for delay in payment—whether by the application of current rather than historic hourly rates or otherwise" is consistent with the goals of fee-shifting statutes. 57 U.S.L.W. at 4738. The district court expressly recognized its duty to consider this factor of delay. Although it denied plaintiff's request for interest, it employed hourly rates that were " 'sufficiently generous . . . to ensure that plaintiff will be amply compensated for all delay.' " *Chambless V*, 697 F. Supp. at 645 (quoting July 20 opinion). The above-quoted language from *Missouri v. Jenkins* suggests that district courts retain latitude in determining how they will compensate prevailing attorneys for delay.

III CONCLUSION

The award of pension benefits is reversed and the case is remanded for an award of benefits consistent with this opinion. The case is also remanded for an award of paralegal fees consistent with *Missouri v. Jenkins*. The rulings on attorney's fees and costs are otherwise affirmed.

Reversed in part, affirmed in part, and remanded.

United States Court of Appeals
FOR THE SECOND CIRCUIT

CHAMBLESS,

Plaintiff, Appellant, Cross-Appellee

— against —

MASTERS, MATES & PILOTS,

Defendants, Appellees, Cross-Appellants,

88-7892, 88-7928

Docket Number

NOTICE OF MOTION

state type of motion

to Recall the Mandate and Expunge and Re-Enter the Order Denying the Petition for Rehear

MOTION BY: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

Arthur M. Wisehart
WISEHART & KOCH
25 West 43d Street, Suite 1114
New York, New York (212) 730-0044
10036

Has consent of opposing counsel:

A. been sought?

☐ Yes

☐ No

B. been obtained?

☐ Yes

☐ No

Has service been effected?

☒ Yes

☐ No

Is oral argument desired?

☐ Yes

☐ No

(Substantive motions only)

Requested return date:

(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order? ☐ Yes ☐ No

B. by firm date of argument notice? ☐ Yes ☐ No

C. If Yes, enter date: _____

Judge or agency whose order is being appealed:

OPPOSING COUNSEL: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

Bettina B. Plevan
 PROSKAUER, ROSE, GOETZ & MENDELSON
 300 Park Avenue
 New York, New York 10022
 (212) 909-7000

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☐ Yes ☐ No

(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion? ☐ Yes ☐ No

If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☐ No

Brief statement of the relief requested: to Recall the Mandate and Expunge and Re-Enter the Order Denying the Petition for Rehearing.

By:
(Signature of attorney)

Appearing for:
(Name of party)

Appellant or Petitioner:
☒ Plaintiff ☐ Defendant
Appellee or Respondent
☐ Plaintiff ☐ Defendant

/s/ Arthur M. Wisheart Arthur Chambless
 Arthur M. Wisheart January 26, 1990

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is granted and this Court's mandate heretofore issued on October 25, 1989 denying appellant's petition for rehearing is recalled and the said order is expunged. A new order is hereby issued as of this date denying appellant's petition for rehearing *nunc pro tunc*, and granting appellant's 60 days from the date of this order to petition for a writ of certiorari.

/s/ Amalya L. Kears

/s/ Richard J. Cardamone

/s/ Lawrence W. Pierce

Circuit Judge

2-8-90

Date

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twelfth day of September one thousand nine hundred and eighty-nine.

Present: HON. AMALYA L. KEARSE
HON. RICHARD J. CARDAMONE
HON. LAWRENCE W. PIERCE

Circuit judges,

88-7892, -7928

ARTHUR M. CHAMBLESS and MILDRED H. CHAMBLESS,

Plaintiff-Appellants, Cross-Appellees,

— V. —

MASTERS, MATES & PILOTS PENSION PLAN, STEPHEN P. MAHER, Administrator of the Masters, Mates & Pilots Pension Plan, C.J. BRACCO, RICHARD M. CASSELBERRY, MICHAEL DI PRISCO, E. GRAS, GEORGE GROH, JUSTIN GROSS, JAMES R. HAMMER, JAMES J. HAYES, MARTIN F. HICKEY, CHARLES JESS, FRANCIS E. KYSER, CHARLES LANDRY, ORION A. LARSON, ROBERT J. LOWEN, LLOYD MARTIN, J. ERIC MAY, DAVID MERRITT, THOMAS E. MURPHY, HENRI L. NEREAUX, WILLIAM OTT, MARTIN PECIL, FRANKLIN J. RILEY, JR., WILLIAM I. RISTINE, A.C. SCOTT, CAPTAIN JOHN SMITH, RUPERT SORIANO, ERNEST SWANSON, MICHAEL SWAYNE, ALLEN TAYLOR, NICHOLAS TELESMANIC, KENNETH P. WENTHEN, C.E. WITCOMB, in their fiduciary capacity as Trustees of the Masters, Mates & Pilots Pension Plan,

Defendants-Appellees, Cross-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the Order of said District Court be and it hereby is affirmed in part, reversed in part and remanded to the said District Court for further proceedings in accordance with the opinion of this Court.

ELAINE B. GOLDSMITH,
Clerk

/s/ Edward J. Guardaro
By: EDWARD J. GUARDARO,
Deputy Clerk

ISSUED AS MANDATE: JANUARY 19, 1990

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 25th day of October one thousand nine hundred and eighty-nine.

ARTHUR CHAMBLESS and MILDRED H. CHAMBLESS,

Plaintiffs-Appellants, Cross-Appellees,

—against—

MASTERS, MATES & PILOTS PENSION PLAN, STEPHEN P. MAHER, Administrator of the Masters, Mates & Pilots Pension Plan, C.J. BRACCO, RICHARD M. CASSELBERRY, MICHEAL DI PRISCO, E. GRAS, GEORGE GROH, JUSTIN GROSS, JAMES R. HAMMER, JAMES J. HAYES, MARTIN F. HICKEY, CHARLES JESS, FRANCIS E. KYSER, CHARLES LANDRY, ORION A. LARSON, ROBERT J. LOWEN, LLOYD MARTIN, J. ERIC MAY, DAVID MERRITT, THOMAS E. MURPHY, HENRI L. NEREAUX, WILLIAM OTT, MARTIN PECIL, FRANKLIN J. RILEY, JR., WILLIAM I. RISTINE, A.C. SCOTT, CAPTAIN JOHN SMITH, RUPERT SORIANO, ERNEST SWANSON, MICHAEL SHAYNE, ALLEN TAYLOR, NICHOLAS TELESMANIC, KENNETH P. WENTHEN, C.E. WITCOMB, in their fiduciary capacity as Trustees of the Masters, Mates & Pilots Pension Plan,

Defendants-Appellees, Cross-Appellants.

A petition for rehearing containing suggestion that the action be reheard in banc having been filed herein by counsel for the Appellants-Cross-Appellees ARTHUR CHAMBLESS and MILDRED H. CHAMBLESS

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
Elaine B. Goldsmith
Clerk

AMENDED JUDGMENT, SIGNED BY THE HON.
ROBERT L. CARTER ON JANUARY 11, 1989,
ENTERED ON THE DISTRICT COURT DOCKET
ON JANUARY 12, 1989 (WITHOUT EXHIBITS A
THROUGH C)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
ARTHUR CHAMBLESS and
MILDRED H. CHAMBLESS,

Plaintiffs,

— against —

MASTERS, MATES & PILOTS
PENSION PLAN, et al.,

Defendants.
-----X

80 Civ. 4258 (RLC)

AMENDED JUDGMENT

#89,0075

This action having been tried by the Court, Hon. Robert L. Carter, District Judge, presiding, on November 16 through November 23, 1983; and the Court having duly made and filed findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure; and a judgment having been entered herein on October 30, 1984; and the United States Court of Appeals for the Second Circuit having remanded the case as reported in 815 F.2d 869; and plaintiffs having moved for an amendment of the judgment and having applied for an award of attorney's fees and costs; and the Court having issued its decisions and orders thereon dated July 20, 1988 (Exhibit A), September 16, 1988 (Exhibit B) and October 19, 1988 (Exhibit C); it is

ORDERED AND ADJUDGED that

(a) the action forfeiting Arthur Chambless' pension rights until he attains age 65 is declared a nullity;

(b) Chambless, having ceased work in the maritime industry within six months of the Supreme Court's February 24, 1986 denial of his petition for a writ of *certiorari* and having certified to the trustees on or about August 5, 1986 that he had done so, is entitled to receive a pension in the amount of \$2,689.02 per month from October 1, 1986 through December 31, 1987, and in the amount of \$2,769.69 per month commencing January 1, 1988, together with any future cost-of-living adjustments applicable to similarly-situated pensioners under the Plan Regulations;

(c) the defendant Pension Plan shall pay Chambless the sum of \$48,173.16, the difference between the pension benefits actually paid and the monthly pension amounts specified in paragraph (b) above, for the period October 1, 1986 through November 30, 1988, in full satisfaction of its obligation to make pension benefit payments to Chambless for the period October 1, 1986 through November 30, 1988;

(d) defendants shall pay a total of \$451,990.51 as an award for plaintiffs' attorney's fees, and plaintiffs are entitled to their costs.

(e) all other claims and causes of action asserted on behalf of plaintiffs are dismissed.

(f) the Court retains jurisdiction of the parties and this cause of action for the purpose of enforcing the judgment and making such further orders as are necessary.

Dated: New York, New York
January 11, 1989

/s/ Robert L. Carter

U.S.D.J.

TO: Wisheart & Koch
25 West 43rd Street
New York, New York 10036-7496
Attorneys for Plaintiffs

THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON 1-12-89

ENDORSEMENT ORDER BY THE HON. ROBERT
L. CARTER REJECTING PLAINTIFFS' SECOND
SUPPLEMENTAL APPLICATION, DATED OC-
TOBER 19, 1988

ARTHUR CHAMBLESS and MILDRED H. CHAMBLESS —
against — MASTERS, MATES & PILOTS PENSION PLAN, et al.

80 Civ. 4258 (RLC)

ENDORSEMENT

In what I hoped was my final opinion on this matter, I stated that "[n]o additional time will be allowed for further submissions." *Chamblless v. Masters, Mates & Pilots Pension Plan*, No. 80 Civ. 4258 (RLC), slip. op. at 8 (S.D.N.Y. September 16, 1988) (Carter, J.). This could only have been interpreted as meaning that no further submissions would be allowed.

Accordingly, plaintiffs' Second Supplemental Application submitted with a covering letter dated October 7, 1988, is rejected and will not be considered.

The filing of the second supplemental application is puzzling since it was filed on the same day that plaintiffs filed a notice of appeal from the opinion and order of the court of September 16, 1988. Having filed the notice of appeal, it would normally be assumed that all matters are before that court. At any rate, with the September 16, 1988 opinion, the case was closed.

IT IS SO ORDERED.

Dated: New York, New York
October 19, 1988

/s/ Robert L. Carter

ROBERT L. CARTER
U.S.D.J.

OPINION AND ORDER OF THE HON. ROBERT L. CARTER,
DATED SEPTEMBER 16, 1988

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
ARTHUR M. CHAMBLESS and
MILDRED H. CHAMBLESS,

Plaintiffs,

— against —

MASTERS, MATES & PILOTS PENSION PLAN, et al.,

Defendants.
----- X

OPINION

80 Civ. 4258 (RLC)

APPEARANCES

WISEHART & KOCH
Attorneys for Plaintiffs
25 West 43d Street
Suite 1114
New York, NY 10036

ARTHUR M. WISEHART
JOHN W. WHITTLESEY
Of Counsel

PROSKAUER ROSE GOETZ & MENDELSON
Attorneys for Defendants
300 Park Avenue
New York, New York 10022

BETTINA B. PLEVAN
JOSEPH BAUMGARTEN
KATHERINE RAYMOND
Of Counsel

CARTER, District Judge

Heedless of the admonition that “[a] request for attorney’s fees should not result in a second major litigation,” *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), plaintiffs move to reargue numerous aspects of the court’s opinion of July 20, 1988. That opinion, with which familiarity is assumed, awarded plaintiffs \$416,191.30 in attorney’s fees and ensured Arthur Chambless an actuarially adjusted monthly pension benefit of \$2,689.09. See *Chambless v. Masters, Mates & Pilots Pension Plan*, No. 80 Civ. 4258 (RLC), slip op. (S.D.N.Y. July 20, 1988) (Carter, J.) (hereinafter “July 20 opinion”). All other motions and requests before the court were denied. Plaintiffs were given 20 days to document their application for costs and expenses and cost-of-living adjustments.

Plaintiffs now request a host of modifications to that decision. They also seek findings of fact pursuant to Rule 52(b), F.R.Civ.P., and a supplemental award of fees totalling over \$90,000. Defendants cross-move for reargument of the actuarial adjustment.¹

I. Motions to Reargue

“The only proper ground on which a party may move to reargue an unambiguous order is that the court has overlooked ‘matters or controlling decisions’ which, had they been considered, might reasonably have altered the result reached by the court.” *Adams v. United States*, 686 F. Supp. 417, 418 (S.D.N.Y. 1988) (Carter, J.) (quoting *Bozsi Ltd. Partnership v. Lynott*, 676 F. Supp. 505, 509 (S.D.N.Y. 1987) (Carter, J.)); see *United States v. Int’l Business Machines Corp.*, 79 F.R.D. 412, 414 (S.D.N.Y. 1978) (Edelstein, J.). A motion to reargue “is not an occasion to reassert arguments previously raised, but dismissed by the court.” *Morgan Guar. Trust Co. of New York v. Garrett Corp.*, 625 F. Supp. 752, 756 (S.D.N.Y. 1986) (Goettel, J.); see *Caleb & Co. v.*

¹ Defendants’ request that the July 20 decision be modified to exclude fees for Paula C. Rowe’s services performed before her admission to the Bar is addressed separately below. See *Baumgarten Aff’t*, ¶ 1.

E. I. DuPont de Nemours & Co., 624 F. Supp. 747, 748 (S.D.N.Y. 1985) (Sweet, J.). As shown below, neither side is entitled to the modifications sought.

A. Defendants' Motion

Defendants seek to reargue the court's decision to grant Chambless an actuarially adjusted pension. They maintain that the court must have overlooked the Pension Plan's lawful "retirement-defined" rule, which provides for the suspension of benefits during periods of employment in the maritime industry. Chambless did not comply with the rule until August, 1986. The actuarial adjustment, defendants argue, therefore conflicts with that rule and with previous court holdings by according plaintiff a pension before he was fully retired.

Defendants' motion is no more than a recapitulation of the argument that an actuarial adjustment is tantamount to an award of retroactive benefits.² The court squarely addressed that issue in the July 20 opinion. "The issue presented is whether an actuarially adjusted pension would be the functional equivalent of an award of retroactive benefits. The court finds that it would not be." *Chambless v. Masters, Mates & Pilots Pension Plan*, No. 80 Civ. 4258 (RLC), slip op. at 37 (S.D.N.Y. July 20, 1988). The underpinnings of that conclusion were amply explained. Defendants have not presented overlooked "matters or controlling decisions" that might reasonably be expected to require a different conclusion. *Ashley Meadows Farm, Inc. v. Am. Horse Show Ass'n*, 624 F. Supp. 856, 857 (S.D.N.Y. 1985) (Sweet, J.). Their motion for reargument is denied.

² Defendants write: "Chambless was thus not entitled to pension benefits between 1977 and 1986 (when he finally did retire). For the same reason, he is not entitled to a recomputed monthly pension benefit that would give him the actuarial equivalent of retroactive benefits." Defendants' Br. at 2. Elsewhere, they state that "the 'actuarially adjusted pension' that Chambless seeks is the functional equivalent of an award of retroactive benefits." *Id.* at 5.

B. Plaintiffs' Motion

Plaintiffs' motion to amend, alter, or clarify the court's decision is a laundry list of grievances. Not content with an award of over \$400,000 in fees, plaintiffs seek the following: (1) interest on the actuarial adjustment and the attorneys's fee award from the date of judgment to the date of payment; (2) reimbursement of Chambless' litigation-related travel expenses; (3) an extension of time for the filing of further documentation of costs and expenses; (4) additional fees; (5) discovery of defendants' billing sheets; and (6) factual findings concerning defendants' insurance coverage for attorney's fees and litigation costs.³

Plaintiffs do not explicitly invoke Local Civil Rule 3(j); nonetheless, their motion is largely one for reargument and will be treated as such. Local Rule 3(j) provides that "[n]o affidavits shall be filed by any party unless directed by the court." Civil Rule 3(j), Local Rules of the United States District Courts for the Southern and Eastern Districts of New York. Plaintiffs have not been so directed, and their affidavits, to the extent that they pertain to reargument, will be disregarded.

1. Interest on the Enhanced Benefit

The July 20 opinion addressed the issue of interest on the fee award, not the issue of interest on the actuarially adjusted pension. Chambless now claims that he is entitled to interest on that amount. On the assumption that Chambless argues that the court overlooked a legal matter, reargument will be permitted. Upon reargument, however, his request is denied.

Chambless claims that interest must be computed from October 29, 1984, the date judgment was entered pursuant to the court's decision declaring the forfeiture of his pension until age 65 a nullity and ordering the Plan to award him a wage-related

³ The Pension Plan is insured against liability for attorney's fees and litigation expenses incurred in this and another action. See *Sokolowski v. Aetna Life & Casualty Co.*, 670 F. Supp. 1199, 1200 (S.D.N.Y. 1987) (Sweet, J.).

pension based on his 1967-1977 employment record. See *Chambless v. Masters, Mates & Pilots Pension Plan*, 602 F. Supp. 904 (S.D.N.Y. 1984) (Carter, J.), *aff'd*, 772 F.2d 1032 (2d Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986). Defendants concede Chambless' entitlement to payment of the difference between the amount due under the July 20 decision and the amount that the Plan in fact paid him. They refute his claim to interest on that amount, and argue that any interest due must run from the date of judgment to be entered pursuant to the July 20 decision.

The court is satisfied that defendants are correct. Under 28 U.S.C. § 1961, "[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court.... Such interest shall be calculated from the date of the entry of the judgment. . . ." 28 U.S.C.A. § 1961 (West's Supp. 1988). Prior to the July 20 decision, Chambless was not deemed entitled to an enhanced pension benefit. Nor was the amount of any such enhancement fixed. The relevant date for the calculation of interest therefore appears to be that of judgment to be entered pursuant to the July 20 decision. See *Powers v. New York Central Railroad Co.*, 251 F.2d 813, 818 (2d Cir. 1958) (interest to be calculated from the date of entry of judgment following increase in money judgment on appeal); *Chemical Bank & Trust Co. v. Prudence-Bonds corp.*, 213 F.2d 443, 445 (2d Cir.), *cert. denied*, 348 U.S. 856 (1954); *cf. Bailey v. Chattem, Inc.*, 838 F.2d 149, 153-155 (6th Cir.) (disfavoring this "formalistic" rule and following that adopted in the First, Third, Fifth, and Ninth Circuits), *cert. denied*, ____ U.S. ____, 108 S. Ct. 2831 (1988). Until that time, interest may not accrue.

2. Interest on the Fee Award

Plaintiffs also move to reargue the court's decision to deny them interest on the fee award. They present no overlooked matters or decisions that in any conceivable way would entitle them to reargument. Their motion is therefore denied.

Wells v. Bowen, N.Y.L.J., Aug. 19, 1988, at 17, col. 3 (2d Cir. Aug. 9, 1988), handed down after the July 20 decision, requires

that the factor of delay in payment "be considered separately from the risks of loss and nonpayment" in a contingent-fee arrangement. *Id.* at 20, col. 3; see Wisehart Letter to Court, Aug. 19, 1988. If plaintiffs mean to suggest that the court failed to take delay into account in assessing a reasonable fee, they are in error. The hourly rates awarded in the July 20 decision were "sufficiently generous . . . to ensure that plaintiff will be amply compensated for all delay." *Chambless v. Masters, Mates & Pilots Pension Plan, et al.*, No. 80 Civ. 4258 (RLC), slip op. at 27-28 (S.D.N.Y. July 20, 1988); see Defendants' Br. at 5-10. If plaintiffs merely seek greater compensation for that delay, they are not entitled to reconsideration of that issue. *Wells* affirms the district court's discretion "to decide how much weight to assign to the risks assumed by an attorney," *Wells*, N.Y.L.J., Aug. 19, 1988, at 17, col. 3. If plaintiffs suggest otherwise, they misconstrue the import of that decision.

3. Reimbursement for Travel Expenses

Plaintiffs ask the court to reconsider its refusal to permit recovery of costs and expenses. They err in two respects: (1) The court fully considered 29 U.S.C. § 1132(g)(1) in making its determination*, and (2) the request for costs and expenses was denied not because plaintiffs were deemed unentitled to recover them but because they had failed to establish their entitlement through adequate documentation. See *Chambless v. Masters, Mates & Pilots Pension Plan, et al.*, No. 80 Civ. 4258 (RLC), slip op. at 31 (S.D.N.Y. July 20, 1988). Plaintiffs present no legal or factual ground for reconsidering that holding, and indeed seem to misunderstand its basis. The motion to reargue is denied.

4. Adjournment of 20-Day Period

Plaintiffs were given 20 days to prepare and submit further documentation of costs and expenses. They now seek an

* That section states that "[i]n any action under this subchapter . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1).

additional 60 days from the date this decision issues to file the requisite papers. They state that "more time is needed . . . in view of the effect of the vacation schedule on the small staff of plaintiff's law firm and its case load. Further, issues raised by this motion may result in an amendment or adjustment in what is allowed." Plaintiffs' Br. at 13.

The request for an additional 60 days is denied. The 20-day period was entirely reasonable given that plaintiffs should have submitted appropriate documentation in conjunction with their initial fee application — a point overlooked by plaintiffs' counsel. Moreover, almost two months have passed since the July 20 opinion issued. Although plaintiffs have made no discernible effort to comply with the 20-day period, the court will assume that, during this period, plaintiffs have made diligent efforts to prepare the appropriate documentation. Plaintiffs have already obtained a measure of the additional time they sought, and although the fault does not rest entirely on the litigants (the court must take some responsibility), this matter has taken far too long in reaching final determination. No additional time will be allowed for further submissions.⁵

5. Fee Parity

Plaintiffs request reargument of the fee award on the ground that the court denied them "fee parity." By this novel term, they apparently mean that defendants' counsel were impermissibly paid and reimbursed at higher rates than were plaintiffs' counsel.⁶ Defendants' Br. at 19. Such a disparity, plaintiffs maintain, violates 29 U.S.C. § 1132(g), and departs from the mandatory "prevailing market rates" standard established in *Blum v. Stenson*, 465 U.S. 886 (1984), and *Miele v. New York State Teamsters Conf. Pension & Retirement Fund*, 831 F.2d 407 (2d Cir. 1987). See Plaintiffs' Br. at 8-10.

⁵ Pursuant to Local Civil Rule 3(j), the Baumgarten affidavit, to the extent that it concerned reargument, was ignored.

⁶ Plaintiffs also argue that "fee parity" requires the court to include paraprofessional services in the lodestar calculation. Plaintiffs' Br. at 9.

Nothing in plaintiffs' motion merits reconsideration of the award. No "controlling decisions or factual matters" previously overlooked have been brought to the court's attention. *Ashley Meadows Farm*, 624 F. Supp. at 857. The court took Section 1132(g) into account, and the fee award was consonant with the "prevailing market rate" standard. That concept means that an attorney is to receive a fee award based on the rates a similarly situated attorney would receive under prevailing market rates. It does not require comparable rates for the attorney receiving an award and opposing counsel. The standard for the court is the prevailing market rates. Defendants' insurance coverage and the concept of "fee parity," although not explicitly addressed in the July 20 decision, have no bearing on the fees to which plaintiffs are entitled. See *Johnson v. University College of University of Alabama*, 706 F.2d 1205, 1208-1209 (11th Cir.), cert. denied, 464 U.S. 994 (1983); *Mirabel v. General Motors Acceptance Corp.*, 576 F.2d 729, 731 (7th Cir.), cert. denied, 439 U.S. 1039 (1978).

As the Court of Appeals for the Eleventh Circuit has stated:

The amount of hours that is needed by one side to prepare adequately may differ substantially from that for opposing counsel, since the nature of the work may vary dramatically. The case may have far greater precedential value to one side than the other. . . . With respect to the hourly rate, one side may employ far more experienced counsel. . . . [W]e cannot conclude that the district court abused its discretion here [by quashing a subpoena and refusing to admit evidence of fees charged by defense counsel].

Johnson, 706 F.2d at 1208 (citations omitted). Moreover, fee parity, as plaintiffs define it, would enable a plaintiff to press "questionable claims . . . [that] could force a defendant to incur substantial fees which [plaintiff] later [could] use [] as a basis for his own fee claim." *Mirabel*, 576 F.2d at 731. Even were this concern groundless here, plaintiffs had "many avenues to obtain evidence to support their fee petition." *Id.* Although their

submissions ultimately were nearly useless to the court, that fact did not prevent the court from assessing what it believes to be a reasonable fee.

The court's implicit rejection of the concept of "fee parity" is therefore not subject to reargument on the instant showing. Moreover, plaintiffs' requests for discovery of defendants' billings and for findings of fact based on defendants' insurance coverage are denied.

II. Supplemental Fee Application

Plaintiffs also seek a supplemental fee award of over \$90,000 for approximately 500 hours of service rendered from April, 1987, through August, 1988. The preceding fee request covered work performed only up through April 24, 1987. The instant fee request includes hours expended on the following: (1) the motion to amend the judgment in order to specify the amount of plaintiff's monthly pension; (2) the former fee application and the instant one; and (3) the motion to strike the Kaplan affidavit, the motion for sanctions, and the motion for recusal.

In addition, plaintiffs request fees for time expended by four individuals — Ingrid Marino, Robert C. Reichelscheimer, Scott M. Yaffe, and Marlaine M. Cragg — whose hours were excluded from the original fee award because plaintiffs did not make it clear to the court whether these individuals were attorneys. See *Chambless v. Masters, Mates & Pilots Pension Plan*, No. 80 Civ. 4258 (RLC), slip op. at 43 n.11 (S.D.N.Y. July 20, 1988). This request brings new factual matters to the court's attention and therefore is not properly treated as a motion for reargument. The requested fees will be regarded as part of the supplemental fee application.

A. Fees for the Four Individuals

Having failed to identify clearly the four individuals named above, plaintiffs now come forward with affidavits that show the following: Marino was admitted to the Bar in 1982 and billed

129.70 hours; Reichelscheimer was admitted to the Bar in 1983 and billed 3 hours; Yaffe was admitted to the Bar in 1984 and billed 1.5 hours; and Cragg was admitted to the Bar in 1986 and billed 183.75 hours.⁷ Rowe Aff't, ¶ 4. Based on a requested hourly rate of \$55 for each individual,⁸ with which the court will not quarrel, the requested fees total \$17,487.25.

Although plaintiffs' piecemeal approach to obtaining fees is far from laudable, the court is mindful of its obligation to determine and award a reasonable fee in this case. *Chambless v. Masters, Mates & Pilots Pension Plan*, 815 F.2d 869, 872 (2d Cir. 1987). Therefore, additional fees will not be denied outright, although, as discussed below, the court finds it appropriate to reduce the amount requested to reflect the fact that plaintiffs' fragmented approach has undoubtedly inflated the number of hours expended on this case.

As defendants point out, a substantial number of the hours expended by Marino, Reichelscheimer, Yaffe, and Cragg preceded each individual's admission to the Bar and thus are not compensable at hourly rates. Marino's overall time figures will accordingly be reduced by 38 hours, Reichelscheimer's by 14.5 hours, Cragg's by 165.25 hours, and Yaffe's by 1 hour. See Baumgarten Aff't, ¶¶ 6-7 and Exh. B. The following hours will be included in the supplemental fee award: 96.7 hours for Marino; .35 hours for Yaffe; and 23.8 hours for Cragg. For reasons set forth in the fee decision, these time figures will be reduced by 30 percent. See *Chambless v. Masters, Mates & Pilots Pension Plan*, No. 80 Civ. 4258 (RLC); slip op. at 32-33 (S.D.N.Y.

⁷ Defendants state the following dates of admission: Marino, 5/12/82; Reichelscheimer, 6/1/83; Cragg, 10/29/86; and Yaffe, 5/7/84. Baumgarten Aff't, ¶ 5; Exh. C.

⁸ With one exception, this is the same rate requested in the original fee application. The rate originally requested for Cragg was \$65 per hour. See Fee Application, ¶ 27 at 15.

July 20, 1988). Adopting the proposed rate of \$55 per hour, the court finds plaintiffs entitled to an additional \$5,051.20 in fees.⁹

B. Additional Fees

Plaintiffs also seek \$90,195 in fees on the basis of newly submitted affidavits and time sheets. Defendants object to the supplemental fee request on several grounds: (1) Chambless has presented no excuse for his failure to incorporate all compensable time into the original fee application; (2) the motions for sanctions, recusal, and to strike the Kaplan affidavit were frivolous; and (3) the work performed after April, 1987, for which Chambless now seeks to recover, was necessary only because Chambless's prior fee application and motion to amend the judgment were unsuccessful. Defendants' Br. at 12-14. Defendants ask that the fee application be denied outright; alternatively, they seek a chance to respond to the application in detail. *Id.* at 13.

The court agrees with defendants that the motions for sanctions, recusal, and to strike the Kaplan affidavit do not merit a recovery of fees. An award of fees pursuant to 29 U.S.C. § 1132(g)(1) is discretionary. "Section 1132(g) . . . does not award attorney's fees to the prevailing party outright; but rather, allows for attorney's fees for either party in accordance with the district court's discretion." *McKnight v. Southern Life & Health Ins. Co.*, 758 F.2d 1566, 1572 (11th Cir. 1985); see *Bittner v. Sadoff & Rudoy Industries*, 728 F.2d 820, 828-830 (7th Cir. 1984). The fee applicant is obligated to "make a good-faith effort to exclude

⁹ This figure was calculated as follows:

Attorney	Recoverable Hours	Less 30 %	Rate	Total
Marino	96.7	67.69	\$55	\$3,722.95
Reichelscheimer	0.0	0.0	\$55	0.0
Yaffe	.5	.35	\$55	19.25
Cragg	34.0	23.8	\$55	<u>1,309.0</u>
TOTAL:				\$5,051.2

from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission.” *Hensley*, 461 U.S. at 434. Should the applicant fail to do so, the court is obligated to exclude unrecoverable hours on its own initiative.

Plaintiffs’ motions for recusal, sanctions, and to strike were baseless. The court cannot in good conscience assess the resulting fees to defendants. *Cf. Bittner*, 728 F.2d at 828 (district court has discretion to deny fees for suit “so completely without hope of succeeding that the court can infer that the plaintiff brought it to harass the defendant rather than to obtain a favorable judgment”). As the court stated in *Boe v. Colello*, 447 F. Supp. 607, 610 (S.D.N.Y. 1978) (Weinfeld, J.):

Any expenditure of time beyond that which is reasonably required suggests either inexperience and devotion of more time than warranted to fairly and properly present claims or, alternatively, that the attorneys, however experienced, engaged in dilettantism; a losing side is not required to pay for such indulgences.

Plaintiffs’ time figures will therefore be reduced by the 39 hours expended on these motions.¹⁰

Although the court is not bound to award fees for time expended on a fee application, *see Woods v. State of New York*, 494 F. Supp. 201, 205 (S.D.N.Y. 1980) (Weinfeld, J.); *Boe*, 447 F. Supp. at 610 & n.14, in this Circuit “time reasonably spent by plaintiff’s attorneys in establishing their fee [is] compensable.” *Gagne v. Maher*, 594 F.2d 336, 344 (2d Cir. 1979), *aff’d*, 448 U.S. 122 (1980). In general, the court agrees with the rationale stated in *Gagne* and elsewhere that a refusal to award fees

¹⁰ The supplemental fee application reveals that plaintiffs’ counsel billed 39 hours in May and June, 1988, in connection with these motions. *See Supplemental Fee Application*, ¶ 14 at 5 & Exh. A.

incurred in connection with the fee application would tend to dilute the fee award and thus to undermine the very purpose of awarding fees. Therefore, the recovery of fees incurred on the fee applications will not be denied outright.

Defendants suggest that plaintiffs' piecemeal approach to the fee award renders this general principle inapplicable. Although they fail to specify in what manner plaintiffs' approach has been prejudicial, the court is persuaded that plaintiffs would have incurred fewer fees and related costs had they submitted a single, comprehensive fee application. Not only have plaintiffs incurred additional fees and costs as a result of their protracted approach to obtaining fees, but plaintiffs have imposed correspondingly greater fees and costs upon defendants. That fact may constitute grounds for reducing plaintiffs' fee request, but it does not permit the court to deny the fee request altogether. As the Court of Appeals has stated, "[t]o the extent that Chambless' actions were 'vexatious[] and wasteful[],' he is obviously penalized by not recovering any attorney's fees for those efforts. This does not affect his right to a reasonable attorney's fee for his successful claim." *Chambless*, 815 F.2d at 872.

Nor is plaintiffs' supplemental application so untimely as to be denied on the ground that it "unfairly surprise[d] or prejudice[d] the affected party." *White v. New Hampshire Dep't of Employment Security*, 455 U.S. 445 (1982) (holding that a fee application under 42 U.S.C. § 1988 is not governed by the 10-day limit imposed on motions to amend judgment under Rule 59(e), F.R.Civ.P.). Defendants do not claim to have been caught off guard by the instant request, and any elements of prejudice, to the extent that they have involve exposing defendants to greater liability for fees and costs, are properly redressed by reducing the requested award, not by denying it altogether.

In sum, the court finds it unreasonable and unfair to subject defendants to liability that might have been avoided had plaintiffs' fee application been inclusive from the start. Plaintiffs do not explain their failure to incorporate all compensable time in a single fee application. The court will reduce plaintiffs' time

figures by 40 percent to ensure that needlessly expended hours, namely, those imposed upon defendants as a result of plaintiffs' piecemeal approach to obtaining fees, are excluded from the fee award. The resulting number of recoverable hours is 277.8.

To arrive at a reasonable lodestar figure, the court will employ the Phase II hourly rates stated in the July 20 decision: Arthur M. Wisheart will receive \$200 per hour for 66.6 recoverable hours billed in 1987 and 11.55 billed in 1988¹¹; John W. Whittlesey will receive \$150 per hour for 25.8 recoverable hours billed in 1987 and .3 billed in 1988; Steven L. Lim will receive \$100 per hour for 58.05 recoverable hours billed in 1987; and Paula C. Rowe will receive \$65 per hour for 20.7 recoverable hours billed in 1987 and 6.3 billed in 1988.¹² Plaintiffs' proposed hourly rates for Marlaine M. Cragg, Janet S. Sussman, and Russell G. Pelton are reasonable and will be adopted. Thus, Cragg will receive \$65 per hour for 3 recoverable hours billed in 1987; Sussman will receive \$45 per hour for .6 recoverable hours billed in 1987; and Pelton will receive \$165 per hour for 81 recoverable hours billed in 1987 and 3.9 billed in 1988. The resulting lodestar figure is \$41,335.50.¹³

¹¹ Wisheart's 1988 time figure was reduced by 39 hours to reflect time expended on the motions for which fees were denied. See Supplemental Fee Application, Exh. A at 9.

¹² Plaintiffs are not entitled to reargue the rate applied to Rowe in the July 20 decision.

¹³ The lodestar calculations follow:

<i>Attorney</i>	<i>Recoverable Hours</i>	<i>Less 40 %</i>	<i>Rate</i>	<i>Total</i>
Wisheart				
('87)	111.0	66.6	\$200	\$13,320.0
('88)	19.25	11.55	\$200	\$ 2,310.0
Whittlesey				
('87)	43.0	25.8	\$150	\$ 3,870.0
('88)	.5	.3	\$150	\$ 45.0

(Footnote continued)

C. Erroneously Included Hours

Defendants point out that Paula C. Rowe, whose 350.75 hours were deemed recoverable at a rate of \$55 per hour in the original fee award, was not admitted to the Bar until March 7, 1984. It appears that 274 hours worked in 1983, and 1 hour worked in 1984, preceded her Bar admission and were improperly included in the lodestar figure. Baumgarten Aff't, ¶ 8. Therefore, the court will reduce the fee award by \$10,587.50.¹⁴

III. Conclusion

Upon reargument, and for the reasons set forth above, plaintiffs are entitled to an adjusted fee award totalling \$451,990.50.¹⁵ Defendants' request for additional time to respond to the supplemental fee application is denied.¹⁶ All remaining arguments

Pelton				
('87)	135.0	81.0	\$165	\$13,365.0
('88)	6.5	3.9	\$165	\$ 643.5
Rowe				
('87)	34.5	20.7	\$ 65	\$ 1,345.5
('88)	10.5	6.3	\$ 65	\$ 409.5
Sussman				
('87)	1.0	.6	\$ 45	\$ 27.0
Cragg				
('87)	5.0	3.0	\$ 65	\$ 195.0
Lim				
('87)	96.75	58.05	\$100	\$ 5,805.0
TOTAL:				\$41,335.5

¹⁴ Rowe's 275 erroneously included hours were reduced by 30 percent, and the resulting total, 192.5 hours, was multiplied by an hourly rate of \$55, to yield a total overpayment of \$10,587.50.

¹⁵ This figure reflects all of the adjustments to the fee awards specified herein.

¹⁶ Defendants provide no explanation or authority for this request, and the court is unwilling to prolong this litigation further by granting it.

advanced by the parties have been fully considered and are found to lack merit.

IT IS SO ORDERED.

Dated: New York, New York
September 16, 1988

ROBERT L. CARTER
U.S.D.J.

OPINION AND ORDER OF THE HON. ROBERT L. CARTER,
DATED JULY 20, 1988

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
ARTHUR M. CHAMBLESS and
MILDRED H. CHAMBLESS,

Plaintiffs,

— against —

MASTERS, MATES & PILOTS PENSION PLAN, et al.,

Defendants.
----- x

OPINION

80 Civ. 4258 (RLC)

APPEARANCES

WISEHART & KOCH
Attorneys for Plaintiffs
25 West 43d Street
Suite 1114
New York, NY 10036

ARTHUR M. WISEHART
JOHN W. WHITTLESEY
Of Counsel

PROSKAUER ROSE GOETZ & MENDELSON
Attorneys for Defendants
300 Park Avenue
New York, New York 10022

BETTINA B. PLEVAN
JOSEPH BAUMGARTEN
Of Counsel

CARTER, District Judge

This case is before the court upon remand for the resolution of two issues: (i) the amount of attorney's fees, costs, and expenses that plaintiff Arthur Chambless is entitled to receive under Section 502(g)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(g)(1), and (ii) the size of the monthly pension benefit to which he is entitled. Also outstanding are plaintiff's motion to disqualify, motion to strike a recently submitted affidavit, and motion for sanctions pursuant to Rule 11, F.R.Civ.P., and 28 U.S.C. § 1927.

Background

The facts of this protracted dispute have been exhaustively stated in four published opinions, two by this court and two by the Court of Appeals.¹ Only the briefest statement of pertinent events is warranted.

Plaintiff Arthur Chambless, a veteran seaman, and his wife, Mildred H. Chambless, brought this action against the International Organization of Masters, Mates & Pilots ("the MM & P"), its Pension Plan ("the Plan"), the Plan's administrator, the Plan's trustees, two employer organizations, and various other defendants. Chambless alleged that defendants violated ERISA by suspending payment of his vested pension after he went to work on a non-MM & P vessel and by causing his benefits to be reduced from approximately \$920 per month beginning at age 55 to approximately \$470 per month beginning at age 65. In addition, plaintiffs asserted a variety of other violations, including antitrust violations and breach of the duty of fair representation. The court dismissed many of plaintiffs' claims and all defendants, except MM & P, the Plan, the Plan's administrator, and the Plan's trustees. See *Chambless v. Masters, Mates & Pilots Pension Plan*, 571 F. Supp. 1430 (S.D.N.Y. 1983) (Carter, J.).

The case proceeded to trial, and, at the close of plaintiffs' case, the court dismissed all claims against the union and all claims involving Mildred Chambless.² The only remaining claim, tried to the bench, was the legality of the forfeiture of Chambless' pension benefits until age 65. The court declared that forfeiture a nullity and ordered that Chambless' application for benefits be

approved if he applied for his pension within six months of the court's decision and certified that he had ceased working in the maritime industry. The court also ordered that the Plan's trustees treat Chambless' application as if it had been made in 1977, thereby assuring him a wage-related pension based on his 1967-77 employment record.³ See *Chambless*, 602 F. Supp. 904, 913 (S.D.N.Y. 1984) (Carter, J.). The Court of Appeals affirmed in all respects and remanded for a determination of the benefits that Chambless would have received in 1977. See *Chambless*, 772 F.2d 1032 (2d Cir. 1985). The United States Supreme Court denied plaintiff's petition and defendants' cross-petition for writs of certiorari. *Chambless*, 475 U.S. 1012 (1986).

Thereafter, Chambless moved in the district court for an order amending the judgment to calculate the pension benefits to which he was entitled and for an award of attorney's fees pursuant to Section 502(g)(1) of ERISA. 29 U.S.C. § 1132(g)(1).⁴ The court summarily denied the motion to amend the judgment and in a separate opinion denied the fee request. See *Chambless*, No 80 Civ. 4258 (RLC), slip op. (S.D.N.Y. June 23, 1986). Plaintiff appealed.

The Court of Appeals, recognizing that Chambless had moved to amend the judgment before his benefits had commenced, considered his motion premature and properly denied. With respect to plaintiff's motion for fees, the Court reversed and remanded. The Court rejected this court's principal rationale for denying plaintiff's motion for fees: namely, that plaintiff's "vexatious[]" and wasteful[]" litigation strategy had increased defendants' costs and legal fees to such an extent that "[w]hatever plaintiffs might have secured in attorney's fees for litigation limited to a vindication of Chambless' pension benefits ha[d] been exceeded by far in costs and expenses plaintiffs have required defendants to expend in defending against their claims." *Id.* at 6-7. The Court held that Chambless' litigation strategy, however vexatious and wasteful, had no bearing on his entitlement to a reasonable fee. *Chambless*, 815 F.2d at 872. Thus, this court was instructed to award a reasonable fee for time spent on the vindicated ERISA claim. The Court also noted that Chambless was

then "concededly receiving approximately \$920 a month." This court was therefore further directed to determine "whether Chambless is now receiving benefits in the amount to which he is entitled." *Id.* at 873.

In taking up plaintiff's motion upon remand, the court asked defendants to respond to aspects of one of plaintiff's affidavits. Defendants complied. Plaintiff now moves to strike defendants' submission and seeks sanctions against opposing counsel and an order of disqualification by reason of alleged prejudice and interest. The court will address plaintiff's motions before turning to the issues upon remand.

Plaintiff's Motions

The court asked defendants in April, 1988, to respond to portions of the affidavit of plaintiff's actuarial expert, Dr. S. Ramanujam. Dr. Ramanujam's affidavit stated, in relevant part, that plaintiff's pension benefits should be recalculated to reflect his life expectancy from the point at which payments began. Ramanujam Aff't, ¶¶ 13-17. Defendants submitted the affidavit of Michael H. Kaplan, the Plan's actuary. Plaintiff promptly moved to strike the affidavit as untimely and unauthorized. Plaintiff also moved for sanctions under Rule 11, F.R.Civ.P., and 28 U.S.C. § 1927 on the ground that the affidavit was filed in violation of the rules of court and a prior stipulation of counsel that all answering papers be served by June 8, 1987.⁵

Plaintiff errs in contending that "n[o] permission from the Court has been obtained for the filing of such an affidavit [after the deadline] nor has cause been shown for its submission." Wisehart Aff't, ¶ 13. The affidavit was submitted at the court's direction. The court's determination that an additional submission from defendants was permissible and essential to the just resolution of the underlying motion necessarily constituted good cause for the untimely submission. *See* Rules 6(b) and 59(c), F.R.Civ.P.; Civil Rule 3(c)(3), Rules for the Southern and Eastern Districts of New York.⁶

Even were that not the case, plaintiff's motion would be denied. The court has examined the Kaplan affidavit and concludes that

it adds nothing to defendants' existing position. The court therefore took no notice of the affidavit in making its determination today. Because no prejudice can result from the challenged submission, there is no basis for granting plaintiff's motion to strike. *Cf. Rawson v. Sears Roebuck & Co.*, 585 F. Supp. 1393, 1397 (D. Colo. 1984) (it "is fundamental that a motion to strike will be denied if no prejudice can result from the challenged allegations"); *Budget Dress Corp. v. Int'l Ladies' Garment Worker's Union, AFL-CIO*, 25 F.R.D. 506, 508 (S.D.N.Y. 1959) (motions to strike not looked upon with favor and "should not be granted ... in the absence of a showing that [the averments] have no relation to the controversy or are clearly prejudicial to the movant"); 5 Wright & Miller, Fed. Practice and Procedure § 1382, at 810-811 (1969).

Plaintiff's motion for sanctions also is baseless. Rule 11, F.R.Civ.P., rests on an "objective standard of reasonable inquiry into the factual and legal soundness of '[e]very pleading, motion, and other paper' signed by the attorney in an action." *Kamen v. Am. Tel. & Tel. Co.*, 791 F.2d 1006, 1010 (2d Cir. 1086) (quoting *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 253-254 (2d Cir. 1985), *cert. denied*, --- U.S. ---, 108 S. Ct. 269 (1987)). Defendant's compliance with the court's request was not objectively unreasonable. Nor was it performed in bad faith. In the absence of a clear showing of bad faith, sanctions are inappropriate under 28 U.S.C. § 1927. *Id.* ("[s]ince bad faith is not claimed to be present here, section 1927 could have no application"). Thus, plaintiff's motion for sanctions is denied.

Plaintiff's final motion is for an order of disqualification or recusal pursuant to 28 U.S.C. §§ 144 and 455. Section 144 provides for disqualification upon a sufficient showing that the presiding judge "has a personal bias or prejudice either against [the moving party] or in favor of any adverse party." 28 U.S.C. § 144. Section 455 requires the presiding judge to disqualify himself "in any proceeding in which his impartiality might reasonable be questioned" or when "he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." 28 U.S.C. § 455(a)

and (b). Plaintiff has not shown grounds for recusal under either provision.

Sections 144 and 455 (b)(1), permitting disqualification for reasons of personal bias or prejudice concerning a party, are governed by a single standard. *In re Int'l Bus. Machines Corp.*, 618 F.2d 923, 928 (2d Cir. 1980). Plaintiff must show that the alleged prejudice stems from "conduct extrajudicial in nature as distinguished from conduct within a judicial context." *Id.* Plaintiff's motion is based solely on the circumstances surrounding the court's request for an additional submission from defendants. *Chambless Aff't*, ¶¶ 3-4; *Wisehart Aff't*, ¶¶ 7-9. Such conduct was in no sense extrajudicial. Plaintiff's "claim of prejudice is based completely on ... conduct and rulings in the case at hand. These we had repeatedly held form no basis for a finding of extrajudicial bias." *In re IBM Corp.*, 618 F.2d at 928. Section 455(a), requiring recusal when the judge's impartiality might reasonably be questioned, also required that the alleged bias not rest on the trial court's rulings. *Id.* at 929. Even if plaintiff had satisfied the foregoing standard, he has not shown that the court's action was adverse to him.⁷ Plaintiff was given adequate opportunity to respond to the Kaplan affidavit and has done so.

Finally, the court is doubtful that plaintiff's motion for recusal is timely. Section 144 requires that the motion be timely made not less than "ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time." 28 U.S.C. § 144. Although Section 455 has no such explicit requirement, our Court of Appeals has assumed that timeliness also is required under that section. Plaintiff's motion comes some eight years into this litigation. *Cf. In re IBM Corp.*, 618 F.2d at 932 (denying motion for recusal that came after more than seven years of proceedings). Granting the motion on the trivial showing presented here would entail an unjustifiable "waste of the judicial resources which have already been invested in the proceeding." *Id.* at 933. Although a judge has a "duty to refuse to sit when he is disqualified[,] ... it is equally his duty to sit where there is no valid reason for recusa[l]." *In re Martin-Trigona*, 573 F. Supp. 1237, 1243 (D.

Conn. 1983) (quoting *Pessin v. Keeneland Ass'n*, 274 F. Supp. 513, 514 (E.D. Ky. 1967). Plaintiff's motion is therefore denied.

Fee Application

Chambless has been instructed to present "an appropriate accounting to the district court of attorney's time spent only on the successful [ERISA] claim." *Chambless*, 815 F.2d at 873. He seeks \$737,534 in fees for 8,024.8 hours of attorney and non-attorney time.⁵ Defendants contend that this lodestar figure is excessive and undocumented.

"The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *Blum v. Stenson*, 465 U.S. 886, 888 (1984). Chambless has submitted affidavits, time sheets, and other documentation that reveal the following:

Paul C. Rowe, an associate at the New York law firm of Wisheart & Koch, plaintiff's attorneys throughout this litigation, reviewed the firm's time sheets and work product and classified the hours expended on this matter into four categories:

- (1) Work exclusively on ERISA matters on which plaintiff prevailed;
- (2) Work on a mixture of ERISA and pension matters;
- (3) Work clearly involving allegations or claims or legal points unrelated to the ERISA or pension matters on which plaintiff prevailed; and,
- (4) Work that Rowe could not classify.

Rowe Aff't, ¶ 7 (Fee Application, Exh. B).

Russell G. Pelton, of counsel to Wisheart & Koch, reviewed Rowe's analysis and concluded that all hours in Category 1 were properly included in the fee award, all hours in Category 3 were properly excluded, and some portion of the hours in Categories

2 and 4 was properly included. To determine which hours in Categories 2 and 4 were compensable, Pelton established 13 subject areas roughly corresponding to the claims that plaintiff asserted at the outset of this litigation.⁹ Time expended in four areas — the ERISA claims, the arbitrary and capricious nature of the pension plan's amendments, the unlawful reduction of Chambless' pension benefits, and the failure to provide adequate notice — was deemed work on the prevailing claim and thus was included in the fee request. Pelton Reply Afft, ¶ 9. Time expended on a fifth item, the suspension of Chambless' benefits, was considered inextricable from work on the prevailing claim and also was included. *Id.* Work in the eight remaining areas was excluded.

Plaintiff then multiplied the includable hours by the following guideline billing rates:

<i>Attorney</i>	<i>Hourly Guideline Rates</i>
Arthur M. Wisehart	\$ 150 (1979-81)
"	\$ 175 (1982-85)
"	\$ 210 (1986-87)
Irene M. Opsahl	\$ 70
John M. Whittlesey	\$ 150
Edmund S. Purves	\$ 150
Robert E. Friou	\$ 150
James D. Hanlon	\$ 60
Steven Lim	\$ 55 (1985)
"	\$ 145 (1986-87)

Fee Application, ¶¶ 16-22. The corresponding rates for law clerks and paralegals were \$45-55 per hour and \$35 per hour, respectively. *Id.* at ¶¶ 16-23.

Defendants contend that plaintiff has not adequately documented the hours worked or the rates claimed, and that the fee application incorporates time not actually spent on the successful claims, fails to exclude frivolous or nonproductive expenditures of time, and employs excessive rates.

A. Adequacy of Plaintiff's Submissions

Plaintiff has submitted almost 200 pages of contemporaneous time sheets recording the time expended and services rendered by Wisheart & Koch attorneys and non-attorneys from 1979 through 1983, summary charts of time expended and services performed in 1984, and computerized print-outs of time expended and services performed from 1985 through 1987. *See* Fee Application, Exh. B. In general, these records comply with the standards of specificity set forth in *New York State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136 (2d Cir. 1983), which requires that a fee application be denied "unless accompanied by contemporaneous time records indicating, for each attorney, the date, the hours expended, and the nature of the work done." *Id.* at 1154; *see Lewis v. Coughlin*, 801 F.2d 570, 577 (2d Cir. 1986).

Nonetheless, dozens of plaintiff's time entries describe counsel's work as merely "Review", "Report", "Further research in library", "Work on Interrogatories," "Letter," "Conferring with Client," or "Indexing." While such vague entries are the exception, not the rule, in plaintiff's submissions, many hours are accounted for under such obscure headings. These entries are so vague that they cannot be said to document the hours claimed.

Although a fee applicant's records need not be extraordinarily detailed, they must identify "the general subject matter of [the claimed] time expenditures," *Hensley*, 461 U.S. at 437 & n.12; *Lyons v. Cunningham*, 583 F. Supp. 1147, 1154 (S.D.N.Y. 1983) (Cannella, J.), and must be sufficiently detailed to enable the district court to identify distinct claims and to eliminate hours that were excessive, redundant, or otherwise unnecessarily spent. "It is impossible to judge the reasonableness of spending two hours on an outline, or five hours on writing and research if the topic of the work is not disclosed." *Soler v. G & U, Inc.*, 658 F. Supp. 1093, 1097 (S.D.N.Y. 1987) (Tenney, J.). Permitting plaintiff to recover on the basis of such vague entries would reward him for maintaining time records that complicate the court's task of assessing reasonable attorney's fees and that augment the risk of error in the amount awarded.

Plaintiff's submissions are flawed in another respect. Although they state the total number of includable hours apportioned to Rowe's Categories 2 and 4, they fail to indicate which of the time-sheet entries assigned to those categories were included in the fee request and which were excluded. Plaintiff's counsel had to make these selections in preparing the fee application. No hint of their decisions is revealed to the court.

Plaintiff contends that these deficiencies in the time records are harmless because Rowe and Pelton were able to determine, on the basis of court papers, correspondence, and memoranda, which hours to include in the application and which to omit. *E.g.*, Pelton Reply Aff't, ¶ 4. That argument reveals a fundamental misunderstanding of plaintiff's burden. Plaintiff must submit time records and other documentation that enable the court to determine whether his apportionment is proper. Obviously, the court should not retrace all of counsel's steps, but it must be "convinced that [the] attorneys reconstructed their hours in a reasonable and [an] accurate manner." *Williamsburg Fair Housing Comm. v. Ross-Rodney Housing Corp.*, 599 F. Supp. 509, 517 (S.D.N.Y. 1984) (Tenney, J.). Plaintiff has not enabled the court to make that determination. Other submissions, such as a chart describing counsel's services month by month from December, 1979, through April, 1987, do not cure the documentary deficiencies. These submissions in themselves are sketchily detailed and do not create a context within which plaintiff's inexplicit time entries are made reasonably comprehensible. *See* Fee Application, ¶ 15. As a result, plaintiff has not presented an adequate accounting of time to this court. *Chambless*, 815 F.2d at 871-871.

Although a line-by-line elimination of inadequately documented hours might yield the most accurate tally of recoverable time, the United States Supreme Court has recognized, as has our own Court of Appeals, that such an approach may be unduly burdensome and need not be adopted in every case. "Where the documentation of hours is inadequate, the district court may reduce the award accordingly." *Hensley*, 461 U.S. at 433. "The district court need not ... scrutiniz[e] each action taken or the time spent on it." *Aston v. Sec'y of Health and Human*

Services, 808 F.2d 9, 11 (2d Cir. 1986) (citing *Carey*, 711 F.2d at 1146). Numerous courts “have endorsed percentage cuts as a practical means of trimming fat from a fee application.” *Carey*, 711 F.2d at 1146. See, e.g., *Copeland v. Marshall*, 641 F.2d 880, 903 & n. 51 (D.C. Cir. 1980) (en banc) (approving substantial “fixed amount” reduction in lodestar amount for nonproductive hours). A percentage reduction has been held appropriate in the face of inadequately documented time figures. See *Soler*, 658 F. Supp. at 1098-1099 (5, 15, and 20 percent reductions for inadequate records); *Ross v. Saltmarsh*, 521 F. Supp. 753, 761-762 (S.D.N.Y. 1981) (Lowe, J.) (5 and 10 percent cuts for submission of reconstructed records), *aff’d mem.*, 688 F.2d 816 (2d Cir. 1982); *Kane v. Martin Paint Stores, Inc.*, 439 F. Supp. 1054, 1056 (S.D.N.Y. 1977) (Lasker, J.) (10 percent reduction for imprecise records), *aff’d mem.*, 578 F.2d 1368 (2d Cir. 1978). After carefully examining plaintiff’s submissions, the court finds a 15 percent reduction reasonable to ensure that the fee award excludes inadequately documented expenditures of time.

B. Includable Hours

Defendants also maintain that plaintiff’s time records incorporate hours spent on matters unconnected with the prevailing claim. To the extent that they argue that plaintiff may recover fees only for work on that claim, defendants are in error.

Under *Hensley v. Eckerhart*, 461 U.S. 424 (1983), a prevailing party is entitled to fees for claims on which he did not prevail if those claims were so intertwined with the prevailing claim that counsel’s work on one claim cannot meaningfully be separated from work on the others. There is no mechanical rule for making this determination. The court should consider whether “plaintiff’s claims for relief ... involve a common core of facts of [are] based on related legal theories [which make] it difficult to divide the hours expended on a claim-by-claim basis.” *Id.* at 435.

Plaintiff concedes that time expended on many of the claims he originally asserted — antitrust law violations, emotional distress, the selection of a sham retirement age, estoppel, union agency, inadequacy of the appeal procedure, failure to provide

requested information, and breach of a duty of fair representation — is not sufficiently related to the prevailing claim to be included in the fee award. The court will not award plaintiff fees that he does not seek. Plaintiff attests that time spent on these eight claims has been omitted from the fee application. Pelton Aff't, ¶ 11; Pelton Reply Aff't, ¶¶ 9-10.

Chambless contends that the remaining five claims are either one on which he prevailed or are sufficiently interwoven with such claims by a common core of facts or a shared legal theory that they are properly included in the fee award. The court agrees. Defendants' amendment of the Plan was found arbitrary and capricious. The amendment was not properly disclosed to plaintiff and would have impermissibly allowed defendants to confiscate a considerable portion of plaintiff's benefits by suspending them until age 65. *Chambless*, 602 F. Supp. 910-913. Consequently, the court finds plaintiff entitled under *Hensley* to reasonable fees for time expended on claims involving the ERISA violations, the arbitrary and capricious amendment, the reduction in benefits, inadequate notice, and the suspension of benefits.

Even so, the court finds the fee request excessive. In his initial fee application, Chambless portrayed his complaint as a "seamless web" and sought fees for all of the 9,000 hours expended in this action. *Chambless*, 815 F.2d at 872. In the instant application, Chambless wisely abandons that characterization. He has reduced his total fee request by approximately 25 percent¹⁰ and claims that this reduction "more than reflects the time that was devoted to issues other than the prevailing pension claim." *Wisehart* Aff't, ¶ 3(k). Given the prolixity of the complaint, the course of this litigation, and plaintiff's avowal that eight claims out of thirteen must be excluded from the fee award, the court disagrees.

Plaintiff offers no argument or analysis in support of the adequacy of his 25-percent reduction, and the court is unpersuaded that this reduction yields a reasonable fee. As the court observed two years ago, "[h]ad this case been brought solely to vindicate Captain Chambless' claim to appropriate pension benefits, [the] case would not have taken, as this one has, [eight] years from institution to the present stage. Discovery would have been

limited to ERISA issues.... and the fees and expenses requested would have been *far short* of the more than \$1 million [plaintiff originally] sought." *Chambless*, No. 80 Civ. 4258 (RLC), Mem. Op. at 3 (S.D.N.Y. June 23, 1986) (Carter, J.) (emphasis added). That conclusion remains essentially sound today.

Accordingly, to arrive at a reasonable fee, the court will reduce plaintiff's claimed hours by an additional 15 percent before multiplying those figures by appropriate hourly rates. This reduction is necessary to ensure that time not properly apportioned to the prevailing claims or related claims is excluded from the fee calculations. The court need not "pretend to have arrived at [this] figure with any degree of scientific precision." *Carey*, 711 F.2d at 1153 n.11. It is helpful "to determine the number of claims upon which plaintiffs succeeded and then to adjust them slightly to account for the relative importance of the claims and their interrelatedness." *Campaign for a Progressive Bronx*, 631 F. Supp. 975, 982 (S.D.N.Y. 1986) (Knapp, J.).

In this case, an overall reduction of 60 percent would, as a matter of mathematical precision, reflect the fact that plaintiff no longer seeks recovery for eight claims out of thirteen. Because it is reasonable to assume that plaintiff's counsel expended proportionately more time on the prevailing claim and related claims than they did on other matters, a smaller reduction will suffice. Plaintiff himself has reduced his total fee request by approximately 25 percent. Taking that fact into account, and considering all of the other circumstances presented here, the court is satisfied that a 15-percent reduction in plaintiff's time figures for inadequate documentation, and a 15-percent reduction for the inclusion of unrecoverable hours, will yield a reasonable time figure and, in turn, a reasonable fee.

Defendants urge the court to reduce the fee request even further. They argue that plaintiff has not made the required "good-faith effort to exclude from [the] fee request hours that are excessive, redundant, or otherwise unnecessary." *Hensley*, 461 U.S. at 434. They point to the fact that plaintiff's counsel spent more than 800 hours fending off defendants' summary judgment motions, more than 500 hours in connection with an appeal and

cross-appeal, 125 hours reviewing union newspapers, 45 hours preparing for a single deposition, 130 hours reviewing thousands of pension files, more than 600 hours preparing trial exhibits, transcripts, post-trial briefs, and proposed findings of fact and conclusions of law, and more than 165 hours in connection with the first fee application and the motion to amend the judgment. Defs. Br. at 23-25. Defendants argue that these time expenditures are excessive and that plaintiff's counsel overstaffed the case.

The court will not reduce plaintiff's requested hours merely because multiple counsel were employed. Defendants have not shown instances in which the involvement of multiple counsel caused an unnecessary duplication of effort. "[E]mploying multiple counsel is not unreasonable per se." *Soler*, 658 F. Supp. at 1099. "Multiple attorneys may be essential for planning strategy, eliciting testimony or evaluating facts of law." *Williamsburg Fair Housing Comm. v. Ross-Rodney Housing Corp.*, 599 F. Supp. 509, 518 (S.D.N.Y. 1984) (Tenney, J.). The court discerns no unreasonable duplication of services here. Nor does the court find the claimed hours subject to reduction on the ground that they are patently unreasonable. Only reasonable and necessarily incurred fees are recoverable. *Nat'l Ass'n of Concerned Veterans, Inc. v. Sec'y of Defense*, 675 F.2d 1319, 1327 (D.C. Cir. 1982) (per curiam). Given the length of this litigation, and the factual and legal complexity involved, the claimed hours do not appear unreasonable. "Like any creative artist, the good litigator may pursue many blind alleys and revise many drafts before producing the convincing brief or argument. In the end, close scrutiny of the [hours claimed] may ameliorate but cannot eliminate the problem of unnecessary work." *In re Agent Orange Product Liability Litigation*, 611 F. Supp. 1296, 1306 (E.D.N.Y. 1985), *aff'd in relevant part*, 818 F.2d 226 (2d Cir. 1987). The reductions already implemented by plaintiff and by the court will ensure that all excludable time has been omitted from the fee request.

C. Reasonable Hourly Rates

Defendants maintain that plaintiff's proposed hourly rates are excessive. They suggest that Arthur M. Wisheart be compensated at \$120 per hour and that his associates and other attorneys be

compensated at \$75 per hour. They also maintain that time expended by paralegals, law clerks, and law school graduates not admitted to practice is not compensable on an hourly basis. Defs. Br. at 30-31, 34.

This Circuit “appears to favor limiting reimbursement for paralegal time to out-of-pocket expense.” *In re Agent Orange*, 611 F. Supp. at 1322; *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 473 (2d Cir. 1974); *Campaign for a Progressive Bronx*, 631 F. Supp. at 983; *Desimone v. Industrial Bio-Test Laboratories, Inc.*, 83 F.R.D. 615, 621 (S.D.N.Y. 1979) (MacMahon, J.). *But see Cardiology Assocs., P.C., Pension Plan Trust v. Nat’l Intergroup, Inc.*, 85 Civ. 3048 (JMW), slip op. (S.D.N.Y. Feb. 13, 1987) (Walker, J.) (awarding \$40 per hour for paralegals). Law clerks and law school graduates not admitted to practice are subject to the same rule of compensation. *Cf. CTS Corp. v. Electro Materials Corp. of America*, 476 F. Supp. 144, 145 (S.D.N.Y. 1979) (Cannella, J.). The effect of this rule is to exclude adjustments to the lodestar figure, costs of overhead, and profit from the amount that is recovered for non-attorney services. *See In re Agent Orange*, 611 F. Supp. at 1322. Because paraprofessional time is properly reimbursed as a cost or an expense, it must be excluded from the lodestar calculation.

With respect to attorney hours, plaintiff bears the burden of showing by “satisfactory evidence” that the hourly rates requested “are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.” *Blum*, 465 U.S. at 895 n.11; *Hensley*, 461 U.S. at 433; *Rosario v. Amalgamated Ladies’ Garment Cutters’ Union*, 749 F.2d 1000, 1005 (2d Cir. 1984); *Blowers v. Lawyers Cooperative Publishing Co., Inc.*, 526 F. Supp. 1324, 1327-1328 (W.D.N.Y. 1981). Judged by this standard, plaintiff’s evidence is meager. He has submitted brief biographical information on the attorneys involved, *see* Fee Application, ¶¶ 16-23, 26; a May, 1987, *Manhattan Lawyer* article stating that the current rates charged by fourteen Manhattan law firms of varying sizes ranged from \$75 to \$125 per hour for associates and from \$190 to \$350 per hour for partners, *see id.*, Exh. C; the affidavit of attorney John

W. Whittlesey stating that, upon review of the fee application and supporting documents, he is "satisfied that the fees and expenses requested are correct," Whittlesey Aff't, ¶ 20; and exhibits attached to a February, 1986 affidavit in an unrelated case showing a wide range of hourly billing rates charged by New York law firms in 1982, 1983, and 1984. See Whittlesey Aff't, Exh. A.

Such submissions do not constitute "specific evidence of the prevailing community rate for the type of work for which [plaintiff] seeks an award." *Nat'l Ass'n of Concerned Veterans, Inc.*, 675 F.2d at 1325. Ideally, evidence of the prevailing market rate should include affidavits from attorneys with similar qualifications stating the precise fees they have received for comparable work or stating the affiant's personal knowledge of specific rates charged by other lawyers for similar litigation, data about fees awarded in analogous cases, evidence of the fee applicant's rates during the relevant time period, and evidence submitted by other fee applicants in like cases. *Id.* at 1325-1326. Plaintiff has failed to submit even his own counsel's affidavits stating the rates customarily billed by Wisehart & Koch during the pendency of this litigation. "[T]he actual rate that applicant's counsel can command in the market is itself highly relevant proof of the prevailing community rate." *Id.* at 1326. Furthermore, Whittlesey's affidavit specifies neither his own billing rates nor his personal knowledge of rates charged by others.

Plaintiff's submissions establish merely an undifferentiated range of rates billed by large New York firms during most of the years at issue. Chambless provides no explanation of how those rates vary according to skill, type of litigation, size of firm, or services rendered. Moreover, the appropriate comparison for Wisehart & Koch is not, as plaintiff appears to believe, to a large firm, "which, because of increased overhead, charges higher rates," but to a small or medium-sized firm. *Huertas v. East River Housing Corp.*, 662 F. Supp. 282, 286 (S.D.N.Y. 1986) (Carter, J.), *vacated on other grounds*, 813 F.2d 580 (2d Cir. 1987). Plaintiff's submissions are therefore virtually useless to the court. "Consequently, the [c]ourt must interject its knowledge and expertise in place of evidence that plaintiff[] could have provided." *Soler*, 658 F. Supp. at 1101.

When services have been rendered over many years, "[n]either historic nor current rates are ideal." *Carey*, 711 F.2d at 1152. Historic rates fail to take into account inflation or opportunity costs; current rates, on the other hand, can overcompensate prevailing parties. *Id.* Our Court of Appeals has voiced its reluctance "to impose upon district courts an added burden of ascertaining precise year-by-year figures in every case." *Id.* The compromise adopted in this Circuit, therefore, is to "divide the litigation into just two phases and use one rate for the early phase and a current rate for the later phase." *Id.*; see *In re Agent Orange*, 611 F. Supp. at 1309 (noting that our Court of Appeals has approved the use of a single rate for litigation lasting up to seven years). The definition of the two phases is entrusted to the trial court's discretion. In this case, the court finds it reasonable to award plaintiff one rate for 1979-82 (Phase I) and a current rate for 1983-87 (Phase II). *Cf. Soler*, 658 F. Supp. at 1102.

In setting reasonable rates of recovery, the court is disposed to treat senior attorneys John W. Whittlesey, Edmund S. Purves, and Robert E. Friou jointly. Plaintiff proposes a single rate for these attorneys, and the court finds them, despite plaintiff's inadequate documentation of their backgrounds, to be of roughly comparable skill and expertise. Whittlesey graduated from Harvard Law School, was Senior Labor Attorney for Union Carbide Corporation from 1952 to 1971, and was Chief Labor Counsel for that corporation from 1971-82; Purves graduated from Harvard Law School in 1955 and participated in the trial preparation of this case, and Friou graduated from Columbia Law School in 1946 and was a partner at Wisheart & Koch. Fee Application, ¶¶ 18-20; Whittlesey Afft, ¶¶ 4-5. The proposed rate of \$150 per hour for these attorneys seems reasonable. That figure compares favorably with rates awarded to attorneys of roughly comparable backgrounds and expertise in this district. See *Miele v. New York State Teamsters Conference Pension & Retirement Fund*, 831 F.2d 407, 408 (2d Cir. 1987) (noting in dicta that claimed rate of \$150 per hour for lawyers with range of skills and experiences was supported by plaintiff's submissions); *Bryson v. Bank of New York*, 81 Civ. 3202 (CSH), slip op. (S.D.N.Y. Jan. 7, 1987) (Haight, J.) (\$90, \$100, and \$105 per hour for experienced solo practitioner for work performed from 1980 to 1984);

Huertas, 662 F. Supp. at 286 (\$125 per hour reasonable in 1978-80 for experienced civil rights attorney from class of 1969).

Friou's services were rendered exclusively during Phase I of this litigation. Fee Application at 13. Whittlesey's and Purves's services were rendered exclusively during Phase II. *Id.* at 14-15. Friou's rate should be adjusted downward to account for this fact. Thus, Whittlesey and Purves will be compensated at the proposed rate of \$150 per hour. Friou will receive \$125 per hour.

Arthur Wisehart, plaintiff's lead counsel throughout this litigation, graduated from the University of Michigan Law School in 1954, specializes in employee rights, transportation, and labor law, has authored numerous published articles, and is a founding member of the firm of Wisehart & Koch. Fee Application, ¶ 16. Given his role in this litigation, Wisehart's hourly rate should be somewhat higher than the rates awarded to Whittlesey, Purves, and Friou. The court finds Wisehart entitled to receive \$175 per hour during Phase I of this litigation and \$200 per hour during Phase II. These rates are in keeping with other rates awarded to comparably situated attorneys in this community. *Cf. Cardiology Assocs., P.C., Pension Plan Trust v. Nat'l Intergroup, Inc., supra* (\$200 per hour for senior partners, \$175 for principal junior partner, \$110 for associates); *Huertas*, 662 F. Supp. at 286 (for class of 1969, hourly rate in 1984 was roughly \$200 and by 1985 was at least \$225); *U.S. Trust Co. of New York v. Executive Life Ins. Co.*, 607 F. Supp. 504, 507 (S.D.N.Y. 1985) (Edelstein, J.) (at large firm, \$250 per hour for senior partner, \$160 per hour for first-year partner, \$72 per hour for first-year associate).

Time expended by three associates also is included in the fee application. Irene M. Opsahl graduated with honors from the University of Wisconsin Law School in 1980 and was Wisehart's chief assistant from 1980 to 1985, when she apparently left the firm. Fee Application, ¶¶ 17, 22. Steven Lim graduated from the Georgetown University Law Center in 1983 and was Wisehart's primary assistant on the case thereafter. *Id.*, § 22. Paula C. Rowe joined the firm in 1983 and worked exclusively on plaintiff's case. Rowe Aff't, ¶¶ 2, 3. All others mentioned in the fee application

were either paralegals, law clerks still in law school, or law school graduates who presumably had not been admitted to the bar.¹¹ Fee Application, ¶ 23. As stated above, the court will exclude these non-attorney services from the lodestar calculation.

Opsahl, Lim, and Rowe should receive roughly comparable rates. Opsahl's rates should be adjusted upward slightly to reflect her additional years of experience. The court believes that \$80 per hour would be a reasonable rate for Opsahl's Phase I services. *Cf. Carey*, 711 F.2d at 1152 (\$50 per hour for associate's services rendered in 1972-77 and \$75 per hour in 1978 and thereafter); *U.S. Trust Co. of New York*, 607 F. Supp. at 507 (\$72 per hour for first-year associate at large firm). Defendants propose a rate of \$75 per hour. Plaintiff asks only \$70 per hour. Plaintiff will receive no more than he has sought. *Huertas*, 662 F. Supp. at 286. Therefore, Opsahl's rate for Phases I and II will be \$70 per hour.

Lim's and Rowe's services were performed exclusively during Phase II. Plaintiff seeks only \$55 per hour for Lim's services in 1985, \$55 per hour for Rowe's services in 1983, 1984, and 1985, and \$65 per hour for Rowe's services in 1986. Fee Application at 14-15. These rates are below what defendants propose and cannot be deemed unreasonable. Thus, the court will employ the foregoing rates. Lim's billed time in 1986 and 1987 is reasonably compensated at \$100 per hour. *Cf. Cardiology Assocs., P.C., Pension Plan Trust v. Nat'l Intergroup, Inc., supra*.

To recapitulate, Friou will receive \$125 per hour. Whittlesey and Purves will receive \$150 per hour. Wisehart will receive \$175 per hour for Phase I and \$200 per hour for Phase II. Opsahl will receive \$70 per hour for both phases. Lim will receive \$55 per hour for services performed in 1985 and \$100 per hour thereafter. Rowe will receive \$55 per hour for services rendered in 1983, 1984, and 1985, and \$65 per hour for services performed in 1986.

D. Interest

Plaintiff seeks to have his fee award enhanced by 11 percent interest compounded annually. *Ramanujam Aff't* (Fee Application, Exh. F). In general, a fee applicant must choose between

an award based on current rates and one based on historic rates adjusted to its present value. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, ____ U.S. ____, ____, 107 S. Ct. 3078, 3081 (1987); *Van Gemert v. Boeing Co.*, 516 F. Supp. 412, 417 (S.D.N.Y. 1981) (Cooper, J.) (current rate takes into account inflation and delay in payment). Thus, at most, plaintiff is entitled to interest on that portion of the award for which historic rates were used.

The court finds no enhancement warranted. The decision to award interest is discretionary. *In re Agent Orange*, 611 F. Supp. at 1314. If the court chooses to take delay into account, it is not required to make "a mechanical calculation of the delay factor on the basis of interest rates." *In re Fine Paper Antitrust Litigation*, 751 F.2d 562, 601 (3d Cir. 1984) (Becker, J. concurring). A delay in payment may be taken into account by employing a multiplier or in setting appropriate hourly rates. *In re Agent Orange*, 611 F. Supp. at 1314. In this case, the court adopted sufficiently generous hourly rates for work performed during Phase I of this litigation to ensure that plaintiff will be amply compensated for all delay.

E. Revised Lodestar Figure

In summary, all time expended by non-attorneys (3,104.55 hours) will be omitted from plaintiff's lodestar calculation altogether. The remaining hours claimed (4,920.25 hours) will be apportioned, based on information contained in the fee application, to Phase I (2,824.6 hours) and Phase II (2,095.65 hours). These time figures will be reduced by a total of 30 percent, a reasonable reduction given plaintiff's inadequate documentation (15 percent cut) and the inclusion of hours not fairly attributable to the prevailing or related claims (15 percent cut). The remaining Phase I and Phase II hours will be multiplied by the appropriate hourly rates. The resulting totals (\$231,117.95 for Phase I and \$185,073.35 for Phase II), when added, will constitute a reasonable revised lodestar figure: \$416,191.30. These calculations are set forth in the Appendix to this opinion.

F. Adjustments to the Lodestar Amount

Once the court has arrived at a reasonable lodestar figure, its task is not necessarily complete. "There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained.'" *Hensley*, 461 U.S. at 434. In the case of a plaintiff who has achieved only partial success, "the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith." *Id.* at 436.

Plaintiff's success in this action must be deemed only partial. He initially sought payment of his pension benefits retroactive to May 1, 1977, damages of \$100 per day for defendants' failure to furnish him with certain pension information, treble antitrust damages, and a declaration that defendants' acts were unlawful and null and void. He also sought punitive damages, costs, and attorneys' fees. *Chambless*, 571 F. Supp. at 1437. Many of these forms of relief have been denied. "A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." *Hensley*, 461 U.S. at 440.

Plaintiff has already reduced his fee request by 25 percent, and the court has reduced the hours requested in the present application by 30 percent. No further reduction is warranted.

G. Costs and Expenses

Plaintiff seeks \$74,613.42 in alleged reimbursable costs and expenses.¹² Fee Application at 15-17. Under Section 502(g)(1) of ERISA, 29 U.S.C. § 1132(g)(1), plaintiff may receive not only reasonable attorney's fees but reasonable costs of action as well. The decision to award costs is committed to the sound discretion of the district court, whose judgment will not be set aside absent an abuse of discretion. *See* 10 Wright, Miller & Kane, Fed. Pract. & Proc. § 2668 at 197 (2d ed. 1983).

In general, the prevailing party receives costs as a matter of course, unless the court or a federal statute or rule directs otherwise. Rule 54(d), F.R.Civ.P. Recoverable costs are not limited to those items enumerated in 28 U.S.C. § 1920.¹³ That statute is permissible, and the fact that most of plaintiff's claimed costs and disbursements are not explicitly enumerated therein does not render them unrecoverable. *Copper Liquor, Inc. v. Adolph Coors Co.*, 684 F.2d 1087, 1099 (5th Cir. 1982). Costs and expenses not explicitly provided for by statute or rule may be taxed by the district court, but under such circumstances the court must exercise its discretion sparingly. *Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 235 (1964).

"Upon submission of adequate documentation, plaintiff[s] attorneys are entitled to reimbursement of those reasonable and necessary out-of-pocket expenses incurred in the course of activities that benefited [plaintiff]." *In re Agent Orange*, 611 F. Supp. at 1314. In this district, costs may be awarded upon submission of "an affidavit of counsel that the costs claimed are allowable by law, are correctly stated and were necessarily incurred. Bills and cancelled checks in payment shall be attached as exhibits." Rule 11(a), Local Civil Rules for the Southern and Eastern Districts of New York ("Local Rule 11").

Plaintiff's submissions are wholly inadequate under the terms of Local Rule 11. Chambless has submitted an eight-page haphazard assortment of airline, carfare, and hotel receipts, some of which are illegible, and all of which appear to pertain solely to plaintiff's costs and expenses, not to counsel's. Thus, \$69,898.56 in claimed costs and disbursements is utterly undocumented. Moreover, plaintiff has not shown, for example, that the requested witness fees (\$12,503.93) were paid to witnesses who actually took the stand, that the requested expert witness fees (\$12,081.38) are commensurate with fees given to ordinary witnesses, and that the requested copying expenses (\$18,077.64) were not incurred solely for the convenience of counsel. See Local Rule 11(c)(3) and (c)(5).

Nor has plaintiff shown that his claimed costs and expenses were necessarily incurred and were reasonably related to the

prevailing claim or related claims. See *Vulcan Soc'y of Westchester Cty., Inc. v. Fire Department*, 533 F. Supp. 1054, 1067 (S.D.N.Y. 1982) (Sofaer, J.). He states, in cryptic terms, that the claimed costs and expenses were reduced by 8 percent to exclude "those expenses that might have been avoided but for non-recoverable items." Fee Application, ¶ 29. Conceivably, the 8-percent reduction was intended to exclude costs and expenses incurred in connection with unprevailing claims. If so, the reduction is insufficient. Even if it were adequate, there is no indication that costs and expenses incurred by plaintiff and his wife were similarly reduced.

Plaintiff concedes the insufficiency of his submissions. He states that "[a]ll of the costs and expenses requested . . . can be substantiated by plaintiff's attorneys if need be," Reply Br. at 34, and that he will "produce whatever further documentation the court believes is necessary." *Id.* at 30. Upon the present showing, his application for costs and expenses is denied. Plaintiff will be granted 20 days from the date this opinion issues to submit an adequate accounting of costs and expenses necessarily and reasonably incurred in connection with the prevailing and related claims.⁴ Those submissions must satisfy the requirements of Local Rule 11. They must be itemized and adequately documented. Upon receipt of such submissions, the court will tax the recoverable costs and expenses. See *Lyons*, 583 F. Supp. at 1156.

Plaintiff is entitled to recover the out-of-pocket expense of paraprofessional time spent on the prevailing claim and related claims. He apportions 3,104.55 hours to such services: 953.75 hours to paralegals and law clerks and 2,150.8 hours to James D. Hanlon, a law school graduate who apparently was not a member of the bar at the time his services were rendered. Because the court has already determined that a 30-percent reduction in attorney hours is necessary to eliminate undocumented and unrecoverable time from the fee application, plaintiff is advised that an equivalent reduction in nonattorney hours seems appropriate.

Plaintiff proposes rates of \$35 per hour for paralegals, \$45 per hour for law clerks, and \$55 per hour for law school graduates

not yet admitted to practice. He provides no indication of the wages actually paid to these non-attorneys. That omission alone justifies denying him compensation for their services. *Campaign for a Progressive Bronx*, 631 F. Supp. at 983. In his revised submissions, therefore, plaintiff is further advised to document the wages actually paid to nonattorneys whose time is included in the fee request.

Plaintiff's Pension Benefits

The court must determine whether plaintiff is receiving pension benefits in the amount to which he is entitled. See *Chambless*, 815 F.2d at 873. Chambless claims that his current monthly benefit of approximately \$850, see *Ramanujam Aff't*, ¶ 6, impermissibly excludes cost-of-living and actuarial adjustments.¹⁵ Furthermore, he claims that the effective commencement date of his benefits should have been September 1, 1986, not October 1, 1986.

A. Cost-of-Living Adjustments

Plaintiff argues that he is entitled, under Article II-A, Section 23, of the Plan's Regulations ("Section 23"), to cost-of-living increases comparable to those given to other 1977 pensioners. In a November 30, 1984, endorsement, the court wrote:

If 1977 pensioners similarly situated to Captain Chambless have received cost of living increments which increase their monthly benefits beyond the 1977 level, it may well be that Captain Chambless might be entitled to a monthly stipend with cost of living increments to bring him on par with other 1977 pensioners.

Chambless v. Masters, Mates & Pilots Pension Plan, et al., No. 80 Civ. 4258 (RLC) (S.D.N.Y. Nov. 30, 1984). That view conforms with the court's holding that, if Chambless certified that he had ceased working in the maritime industry and applied for his pension within six months of the court's trial opinion, "the trustees [were] to treat the application as if it had been made in 1977..." *Chambless*, 602 F. Supp. at 913.

Section 23 permits cost-of-living increases for "Pensioners on the pension rolls as of January 1, 1979," and thereafter. *Ramanujam Afft*, Exh. C. The court's ruling that plaintiff be treated as though he applied for his pension in 1977 requires that he not be denied cost-of-living increases merely because he was not actually on the pension rolls as of the specified date.

Defendants argue that Section 23(b) prohibits such increases "for any calendar year in the case of a Pensioner who, while receiving pension benefits in the prior year, has earned in excess of the maximum then allowable in such prior year under Social Security without reduction in the Social Security payment." *DeSimone Afft*, ¶ 11, and Exh. F. "[G]iven the fact that he worked steadily as a licensed deck officer from 1977 to August 1986," defendants argue, "it seems unlikely that [plaintiff's] earnings were ever sufficiently low to enable him to qualify for a cost-of-living adjustment." *Id.* Plaintiff responds that Section 23(b) prohibits cost-of-living increases only to pensioners who received *both* income in excess of Social Security maximums and a pension benefit in the previous year. Since Chambless did not begin receiving his pension benefits until October, 1986, he argues, defendants have no reason to believe that he must be disqualified under the terms of Section 23(b).

Plaintiff errs in two respects. First, to the extent that he seeks cost-of-living adjustments for any year prior to that in which his benefits actually commenced, plaintiff ignores the undisputed fact that he is not entitled to retroactive benefits. The Plan's trustees acted lawfully in requiring Chambless to retire fully before his pension benefits could commence. *Chambless*, 602 F. Supp. at 913. Any cost-of-living adjustments due, therefore, may be based only on benefits received after plaintiff was fully retired. Second, plaintiff errs in asking to be exempted from the conditions of Section 23(b). The court did not intend plaintiff to be accorded privileges unavailable to similarly situated 1977 pensioners, all of whom must satisfy the terms of Section 23(b) before receiving cost-of-living increases.

Plaintiff has not submitted documentation indicating his entitlement to such increases under the Plan's Regulations.

Therefore, his request for cost-of-living adjustments must be denied at this time. Chambless is entitled to have the court determine whether he is due such adjustments from the date his benefits began. Therefore, within 20 days of the date this opinion issues, plaintiff may submit documentation to the court that he believes establishes his entitlement to cost-of-living adjustments under the Plan's Regulations, including Section 23(b).

B. Actuarial Adjustment

Plaintiff further contends that his current pension benefit is not the actuarial equivalent of the amount that would have been payable in 1977. *Wisehart Aff't*, ¶ 7. Dr. S. Ramanujam, an actuary who appeared as an expert witness in this case, attests that "a further adjustment should be made in the amount of the benefit to reflect the fact that, as of the time that Captain Chambless commenced receiving it, his life expectancy was materially shorter than his life expectancy in May 1977, when the benefit was initially calculated." *Ramanujam Aff't*, ¶ 13. Defendants do not contest the factual claim. They argue that the requested recalculation amounts to a plea for retroactive benefits, which this court and the Court of Appeals have unequivocally disallowed.

The issue presented is whether an actuarially adjusted pension would be the functional equivalent of an award of retroactive benefits. The court finds that it would not be. An award of retroactive benefits, by definition, would increase the total amount of benefits to which the court has found plaintiff entitled. The adjustment that plaintiff seeks, however, would not alter the total amount of pension benefits to which he is entitled over the course of his expected lifetime. It would merely recognize that that amount will now be payable over a shorter period of time. Thus, viewed from the perspective of his total projected lifetime benefits, the adjustment plaintiff seeks would not increase his benefits. Nor would it place him at an advantage compared to similarly situated 1977 pensioners. It would merely enable him to remain on a par with those pensioners.

The court's earlier rulings guaranteed plaintiff a wage-related benefit based on his 1967-77 employment records. That intention

would be thwarted if defendants were now permitted to diminish plaintiff's total projected benefits by denying the fact that payments did not commence until 1986. Previously, the court held that defendants had "not only suspended Chambless' rights to benefits until age 65 but [had] confiscated a considerable part of those benefits." *Chambless*, 602 F. Supp. at 911. It would avail plaintiff little for the court to have prevented that confiscation only to permit another confiscation now based on a different premise.

Defendants' position is further flawed by internal inconsistency. Defendants concede that they employed the "more favorable actuarial factor that was in effect in 1986" to calculate Chambless' "husband and wife" pension.¹⁶ See *DeSimone Aff't*, ¶¶ 5-8. If defendants were willing to use a 1986 actuarial factor to calculate plaintiff's "husband and wife" pension, then they should be willing to use a 1986 actuarial figure to calculate his gross monthly benefit.

For the foregoing reasons, the court finds plaintiff entitled to an actuarial adjustment of his monthly pension benefit. Dr. Ramanujam states that the adjusted benefit, omitting the requested cost-of-living adjustments and taking into account plaintiff's selection of a "husband and wife" pension, should total \$2,689.02 per month. *Ramanujam Aff't*, ¶ 14. Defendants propose no alternative figure. Dr. Ramanujam's figure appears reasonable and will be adopted by the court.

C. Starting Date of Pension Benefits

Plaintiff claims that his pension benefits should have commenced on September 1, 1986, not October 1, 1986. Chambless applied for his pension benefits on August 5, 1986. *DeSimone Aff't*, Exh. G. Under Article IV, Section 3, of the Plan's Regulations, the Plan ordinarily commences payment on the first day of the month following the expiration of a full calendar month after submission of a pension application. *Id.* The Court discerns no departure from the Plan's usual procedure in the treatment of Chambless' pension application. That Chambless initially applied for his pension in 1977 and was admitted to the rolls presumably

did not relieve defendants of the need to reprocess his application. Plaintiff cites no other ground for adjusting the commencement date. Therefore, plaintiff's request is denied.

Conclusion

For reasons set forth above, plaintiff's motions to strike the Kaplan affidavit, to impose sanctions under Rule 11, F.R.Civ.P., and 28 U.S.C. § 1927, and for disqualification or recusal pursuant to 28 U.S.C. §§ 144 and 455 are denied.

Plaintiff is entitled to recover \$416,191.30 in attorney's fees from defendants. Plaintiff's application for costs and expenses is denied. Plaintiff may submit to the court, within 20 days of the date this opinion issues, an appropriately itemized and documented accounting of recoverable costs and expenses. Defendants' motion for costs pursuant to Rule 11, F.R.Civ.P., is denied.¹⁷

Plaintiff's request for cost-of-living adjustments also is denied. Plaintiff may submit to the court, within 20 days of the date this opinion issues, documentation that he believes establishes his entitlement to such adjustments. Plaintiff's monthly benefit will be actuarially adjusted to \$2,689.02. Plaintiff's request for a declaration that his pension benefits should have begun on September 1, 1986, is denied.

The court has carefully considered all other arguments advanced by the parties and finds them to be without merit.

IT IS SO ORDERED.

Dated: July 20, 1988
New York, New York

/s/ Robert L. Carter
ROBERT L. CARTER
U.S.D.J.

APPENDIX

Phase I Calculations (1979-82)

Attorney	Hours Expended	30 % Reduction	Rate	Total
Wisehart	1253.80	877.66	\$175	\$ 153,590.50
Opsahl	1556.30	1089.41	\$ 70	\$ 76,258.70
Friou	14.50	10.15	\$125	\$ 1,268.75
TOTAL:				\$ 231,117.95

Phase II Calculations (1983-87)

Attorney	Hours Expended	30 % Reduction	Rate	Total
Wisehart	905.75	634.025	\$200	\$ 126,805.00
Opsahl	738.65	517.055	\$ 70	\$ 36,193.85
Whittlesey	1.00	.70	\$150	\$ 105.00
Purves	42.75	29.925	\$150	\$ 4,488.75
Lim				
('85)	3.25	2.275	\$ 55	\$ 125.125
('86, '87)	53.50	37.450	\$100	\$ 3,745.00
Rowe				
('83-85)	335.50	234.850	\$ 55	\$ 12,916.75
('86)	15.25	10.675	\$ 65	\$ 693.875
TOTAL:				\$ 185,073.35

Footnotes

¹ See *Chambless v. Masters, Mates & Pilots Pension Plan*, 571 F. Supp. 1430 (S.D.N.Y. 1983) (Carter, J.) granting partial summary judgment to defendants), *later proceeding*, 602 F. Supp. 904 (S.D.N.Y. 1984) (Carter, J.) (declaring forfeiture of plaintiff's pension until age 65 a nullity and ordering that pension benefits be paid upon conditions), *aff'd*, 772 F.2d 1032 (2d Cir. 1985) (remanding for determination of pension benefits), *cert. denied*, 475 U.S. 1012 (1986), *later proceeding*, 15 F.2d 869 (2d Cir. 1987) (affirming court's refusal to amend judgment, reversing court's denial of attorney's fees, and remanding for determination of a reasonable fee award).

² Arthur Chambless thus became the sole plaintiff in this action.

³ "Since the base years for calculating the wage-related pension are the ten years immediately prior to retirement . . . , the ten years in question in Chambless' situation are the years during which he was employed at a low rate of pay on non-MM & P vessels. . . . Consequently, by postponing benefits until age 65, . . . and then utilizing the wage-related formula to calculate those benefits, the amount of Chambless' pension [would have been] significantly reduced." *Chambless*, 772 F.2d at 1039.

⁴ "In any action under this subchapter . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1).

⁵ "Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927 (Supp. 1988).

⁶ Civil Rule 3(c)(3) permits papers to be submitted after the filing deadline "upon special permission granted by the court for good cause shown." Rule 3(c)(3), Local Rules for the Southern and Eastern Districts of New York.

⁷ Plaintiff seems to be under the mistaken impression that, but for the Kaplan affidavit, he could not have lost on his motion for an actuarial adjustment of his pension. It borders on the ludicrous to claim that the court would be "constrained to rule in [plaintiffs] favor without something in the nature of the Kaplan affidavit in opposition." Chambless Aff't, ¶ 5.

⁸ Plaintiff misstated Arthur M. Wisehart's 1979 fees for the prevailing claim: If Wisehart billed 14.5 hours at \$150 per hour, the correct total is \$2,175, not \$217.50. *See* Fee Application, ¶ 16. Thus, the total fee award plaintiff seeks is \$737,534, not \$735,576.50.

⁹ Pelton's 13 subject areas are the following: (1) ERISA or pension claims; (2) the capricious nature of the action to amend the union pension plan; (3) reduction in pension benefits claim; (4) failure to provide adequate notice of amendments; (5) suspension of benefits and the ERISA provisions; (6) selection of age 65 as the retirement age; (7) estoppel of the union in suspending early retirement; (8) union agency in representing plaintiff; (9) refusal by the union to comply with plaintiff's request for information; (10) adequacy of review of plaintiff's application; (11) fair representations of plaintiff by the union; (12) emotional distress of plaintiff; and (3) antitrust violations by shipping companies and the union. Fee Application, Exh. D, ¶ 11.

¹⁰ Plaintiff initially sought \$911,536.75 in fees, a 1.5 risk-multiplier, \$69,996.96 in reimbursable costs and expenses, and interest at 11 percent. Plaintiff's Br. at 8-9. The request for a multiplier was dropped. *See* Plaintiff's Br., Nov. 13, 1987, at 25. The current fee request, adjusted to reflect the fact that it covers one year more than the previous request, is approximately 25 percent lower than what plaintiff originally sought.

¹¹ Plaintiff describes Ingrid Marino, Robert C. Reichelscheimer, David P. Howe, Scott M. Yaffe, and Marlaine Marie Cragg as lawyers but requests that they be compensated at law clerk rates. Because plaintiff has not made it clear to the court whether these individuals are attorneys, the court will exclude their services from the lodestar calculation.

¹² Counsel's costs and expenses totalled \$69,898.56. Fee Application, ¶ 29. To that total was added \$4,714.86 (plaintiff's figure, \$5,160.86, is miscalculated) incosts and expenses incurred by Chambless and his wife.

¹³ The items listed are the following: (1) Fees of the clerk and marshal; (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case; (3) Fees and disbursements for printing and witnesses; (4) Fees for exemplification and copies of papers necessarily obtained for use in the case; (5) Docket fees under section 1923 of this title. 28 U.S.C. § 1920.

¹⁴ The court notes that the Court of Appeals has stated that plaintiff is entitled to recover ordinary costs incurred on appeal. Plaintiff should submit an appropriate accounting to the court.

¹⁵ Plaintiff states that he currently receives \$846.78 per month. Ramanujam Aff't, ¶ 6. Defendants put the amount at \$859.43. DeSimone Aff't, ¶ 7. The discrepancy is small. The court will adopt plaintiff's figure.

¹⁶ The "husband and wife" pension plan option assured Chambless an adjusted monthly benefit for life and, in the event that his wife survives him, ensured here a monthly benefit for life equal to 50 percent of his benefit. *See* DeSimone Aff't, ¶ 5.

¹⁷ Defendants characterize plaintiff's fee application as patently improper and his motion to amend the judgment as a baseless request for retroactive pension benefits already unequivocally denied by this court and the Court of Appeals; consequently, they move pursuant to Rule 11, F.R.Civ.P., to recover costs incurred in responding to these motions. The court finds no basis for an award of sanctions on either motion.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 539—August Term, 1986

(Argued: January 5, 1987 Decided: April 6, 1987)

Docket No. 86-7789

ARTHUR CHAMBLESS and MILDRED H. CHAMBLESS,
Plaintiffs-Appellants,

— v. —

MASTERS, MATES & PILOTS PENSION PLAN, et al.,
Defendants-Appellees.

Before:

FEINBERG, Chief Judge, VAN GRAAFEILAND and PIERCE,
Circuit Judges.

Appeal by Arthur and Mildred Chambless from orders
of the United States District Court for the Southern Dis-

trict of New York, Robert L. Carter, J., denying their request for attorney's fees and refusing to amend the judgment to specify the amount of an ERISA pension benefit.

Affirmed in part and reversed in part.

ARTHUR M. WISEHART, New York, NY (Wisehart & Koch, John W. Whittlesey, of Counsel), for Plaintiffs-Appellants.

BETTINA B. PLEVAN, New York, NY (Proskauer Rose Goetz & Mendelsohn, Joseph Baumgarten, of Counsel), for Defendants-Appellees.

FEINBERG, *Chief Judge*:

This case requires review of the standards for the award of attorney's fees under the Employee Retirement Income Security Act (ERISA) 29 U.S.C. §§ 1001-1461. Plaintiffs Arthur and Mildred Chambless (Chambless) appeal from orders of the United States District Court for the Southern District of New York, Robert L. Carter, J., denying their motion for an award of attorney's fees and their motion to amend the judgment. For reasons set forth below, we affirm in part and reverse in part.

Background

This is the second time this case has come before us. On the prior appeal and cross-appeal, we affirmed Judge Carter's holding that a pension plan amendment postponing and reducing Chambless' pension rights was arbitrary and

capricious and therefore void. *Chambless v. Masters, Mates & Pilots Pension Plan*, 772 F.2d 1032 (2d Cir. 1985), cert. denied, 106 S. Ct. 1189 (1986). Although familiarity with that opinion is assumed, we will recite those facts necessary to understand the present appeal.

Chambless originally brought suit against the Masters, Mates & Pilots Pension Plan (the Plan), its trustees, its administrator and a variety of other parties. The complaint alleged a host of wrongs, including various ERISA violations, restraint of trade and breach of the duty of fair representation. Judge Carter granted defendants summary judgment on many of Chambless' claims, see *Chambless v. Masters, Mates & Pilots Pension Plan*, 571 F. Supp. 1430 (S.D.N.Y. 1983), and dismissed others at the close of Chambless' case at trial. What remained was Chambless' contention that Amendment 47 of the Plan was arbitrary and capricious.

Amendment 47 was part of an effort by the International Organization of Masters, Mates & Pilots (the Union) to pressure older deck officers to retire, thereby creating openings for younger officers so that the younger officers would be content with their union affiliation. As part of this effort, the Union began assigning senior deck officers to lower grade, and lower paying, assignments, *Chambless v. Masters, Mates & Pilots Pension Plan*, 602 F. Supp. 904, 911 (S.D.N.Y. 1984), *aff'd*, 772 F.2d 1032 (2d Cir. 1985), cert. denied, 106 S. Ct. 1189 (1986). Since pension benefits under the Plan are wage-related, accepting lower paying jobs reduced the senior officers' pensions.

An older deck officer who refused to accept the low grade assignments had the option of either retiring or entering the employ of a company not affiliated with the

Plan. Amendment 47 decreased the attractiveness of the latter option, however, by providing that an unretired officer, with vested rights under the Plan, who worked for a company that did not participate in the Plan would not receive pension benefits until age 65. In contrast, a retired officer who subsequently worked for a plan participant had to wait no more than six months after he again retired for his pension benefits to resume, regardless of his age. Thus, by delaying their pensions, Amendment 47 effectively punished plan participants for working for non-participant employers. See 772 F.2d at 1039.

The punitive effect of Amendment 47 on Chambless was twofold. By accepting work from a company not participating in the Plan, Chambless would not only forfeit rights to his pension for the almost ten years until he reached age 65, but because of the wage-related provision, "the forfeiture carried an added penalty of halving the benefits . . . he would receive." 602 F. Supp. at 910. Chambless, who had accepted work outside the Plan, brought suit to contest the validity of Amendment 47. The district court found that Amendment 47 violated ERISA, 602 F. Supp. 904, and this court affirmed the judgment and remanded "for a determination of the benefits which Chambless would have received in 1977," 772 F.2d at 1043.

After our decision in this case, Chambless moved in the district court to amend the prior judgment in order to calculate the pension benefit to which he was entitled and for an award of attorney's fees. The district court summarily denied the request to amend the judgment and in a separate opinion denied the request for attorney's fees. We first address the request for attorney's fees.

Attorney's Fees

An application for attorney's fees in an ERISA case is governed by 29 U.S.C. § 1132(g)(1).¹ Ordinarily, the decision is based on five factors: (1) the degree of the offending party's culpability or bad faith, (2) the ability of the offending party to satisfy an award of attorney's fees, (3) whether an award of fees would deter other persons from acting similarly under like circumstances, (4) the relative merits of the parties' positions, and (5) whether the action conferred a common benefit on a group of pension plan participants. See *Ford v. New York Central Teamsters Pension Fund*, 506 F. Supp. 180, 183 (W.D.N.Y. 1980), *aff'd.*, 642 F. 2d 664 (2d Cir. 1981) (*per curiam*).

Judge Carter applied the five-factor test to Chambless' motion for attorney's fees. Although he concluded that each of the first four factors "must be decided in plaintiffs' favor" and that Chambless' suit did confer a common benefit, he declined to award fees. The decision of whether to award fees lies within the discretion of the district court. See *Fase v. Seafarers Welfare and Pension Plan*, 589 F.2d 112, 116 (2d Cir. 1978). However, because Chambless satisfied each element of the five-factor test, properly construed, we find it was an abuse of discretion to refuse to award any attorney's fees.

In declining to make an award, the district court relied in part on its finding that Chambless did not satisfy the fifth factor because his suit was not "brought" to confer a common benefit. In support of this view the judge cited

¹29 U.S.C. § 1132(g)(1) provides:

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

Chambless' decision, at the start of this litigation, to opt out of a class action suit brought in the Eleventh Circuit, *Deak v. Masters, Mates and Pilots Pension Plan*, No. 79-190-Civ.-T-H (M.D. Fla. June 4, 1984). In *Deak*, the plaintiff class challenged Amendment 46 to the Plan. Both Amendments 46 and 47 covered officers who worked for employers not participating in the Plan; Amendment 46 covered officers who came out of retirement, while Amendment 47 covered officers who had never retired. Judge Carter found that both provisions " 'drew a distinction between certain types of re-employment in the industry primarily to protect [the Union] by discouraging members who were eligible for their pension from accepting any job which benefited a competing union.' " (citing *Deak*, slip op. at 15). The plaintiffs in *Deak* were successful, and Judge Carter apparently felt that Chambless could have obtained his relief in that suit. Thus, although Chambless' suit did confer a common benefit by neutralizing Amendment 47, Judge Carter felt that since Chambless chose to opt out of the *Deak* class on the basis of claims that eventually failed, his suit was not "brought" to confer a common benefit.

In distinguishing between the motivation for the ERISA claim and the effect of the claim, Judge Carter relied on language used in *Miles v. New York State Teamsters Conference Pension and Retirement Fund Employee Pension Benefit Plan*, 698 F.2d 593, 602 n.9 (2d Cir.), cert denied, 464 U.S. 829 (1983). But *Miles* in turn relied on the opinions of the district court and this court in *Ford v. New York Central Teamsters Pension Fund*, cited above, for the formulation of the factors to be considered in ruling on a fee request under ERISA. Those opinions looked not to plaintiff's motive in bringing suit, but to the effect of plaintiff's victory. It is the latter that is controlling. In

short, since the district court found that Chambless' suit had the effect of conferring a common benefit, the fifth factor of the test was satisfied.

Judge Carter's opinion also makes clear that he declined to award attorney's fees, even for time spent on the vindicated ERISA claim, because "[w]hatever plaintiffs might have secured in attorney's fees for litigation limited to a vindication of Chambless' pension benefits has been exceeded by far in costs and expenses plaintiffs have required defendants to expend in defending against their claims." Defendants, however, have not been blameless in this case. The five-part test takes into account the relative merits of the parties' positions and also requires findings about bad faith. With respect to the ERISA claim on which plaintiff prevailed, the district court resolved both of these factors in his favor. The district court's decision to deny fees completely improperly shifts the issue from whether Chambless is entitled to attorney's fees for his successful claim to whether he should be penalized for his litigation strategy. To the extent that Chambless' actions were "vexatious[] and wasteful[]," he is obviously penalized by not recovering any attorney's fees for those efforts. This does not affect his right to a reasonable attorney's fee for his successful claim.

ERISA's attorney's fee provisions must be liberally construed to protect the statutory purpose of vindicating retirement rights, even when small amounts are involved. See *Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587, 589-90 (9th Cir. 1984). In this case, the district court found plausible the claim of Chambless' attorneys that they had spent over 9,000 hours and "almost \$1 million in lawyers' time" on their clients' behalf. They did succeed in doubling his pension, and all the factors of the

ERISA fees test weighed in Chambless' favor. The district court stated, "[h]ad this case been brought solely to vindicate Captain Chambless' claim to appropriate pension benefits, I would have no hesitancy in awarding attorney's fees, since I am satisfied that he was treated badly to serve the political purposes of [the Plan]." Chambless' other claims do not affect this entitlement. Accordingly, on this issue we reverse and remand to the district court so that it can determine and award a reasonable fee for the time spent on Chambless' vindicated ERISA claim.

In his original motion for attorney's fees, Chambless stated "[i]t would not be partial [sic] or feasible to separate" the time reasonably spent on his successful claim out of the 9,000 hours his attorneys expended; he argued instead that his claims constituted "a 'seamless web.'" Judge Carter's reluctance to make a fee award in the face of these assertions is understandable. After his motion for attorney's fees was denied, Chambless did retreat somewhat from his position that the time spent on his successful claim could not be identified. On remand, however, the burden will lie with Chambless to present an appropriate accounting to the district court of attorney's time spent only on the successful claim.

Pension Benefit

Chambless also claims that the district court ignored this court's mandate by refusing to amend the judgment to specify the amount of the monthly pension he is entitled to receive. In its prior opinion, the district court held that if Chambless retires and applies for a pension, "the trustees are to treat the application as if it had been made in 1977 and grant him a wage related pension based on his 1967-1977 employment record." 602 F. Supp. at 913. That decision was affirmed in all respects by this court,

see 772 F.2d at 1043. We remanded the case to the district court to determine "the benefits which Chambless would have received in 1977." *Id.*

It appears that Chambless did not actually apply for his pension until August 5, 1986; payments to him commenced as of September 1. The district court's final decision not to amend the judgment came on August 20, 1986—before Chambless began receiving benefits. Therefore, any claim by Chambless that the monthly benefit he would receive would be inadequate could have been properly denied as premature. To that extent, we affirm the refusal of the the district court to amend its judgment. However, Chambless is now concededly receiving approximately \$920 a month. Any claim that this sum fails to include required cost-of-living adjustments and related claims that he is not receiving, or has not received, the monetary benefits to which he is entitled under the Plan may now be presented to the district court. Upon such presentation, our prior mandate in this case requires the district court to determine whether Chambless is now receiving benefits in the amount to which he is entitled.

Judgment affirmed in part, reversed in part and remanded.

OPINION AND ORDER OF THE HON. ROBERT L. CARTER,
DATED JUNE 23, 1986

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X

ARTHUR CHAMBLESS and
MILDRED H. CHAMBLESS,

Plaintiffs,

OPINION

— against —

80 Civ. 4258
(RLC)

MASTERS, MATES & PILOTS
PENSION PLAN, et al.,

Defendants.

----- X

APPEARANCES

WISEHART & KOCH
Attorneys for Plaintiffs
25 West 43rd Street
New York, New York 10036

ARTHUR M. WISEHART

Of Counsel

PROSEKAUER ROSE GOETZ & MENDELSON
Attorneys for Defendants
300 Park Avenue
New York, New York 10022

BETTINA B. PLEVAN
JOSEPH BAUMGARTEN
KATHERINE RAYMOND

Of Counsel

CARTER, District Judge

Plaintiffs have moved for an award of attorney's fees pursuant to § 502(g) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1329(g), and in their application seek \$911,536.75 as the lodestar figure, plus a risk multiplier of 1.5 in attorney's fees and \$69,996.96 in reimbursable costs and expenses, with 11% interest requested on this latter item. The procedure agreed upon in approaching decision on this issue is to determine first whether an attorney's fee award is warranted. If the court decides that such an award is appropriate, then the amount of the award will be addressed. While plaintiffs have briefed both issues, defendants have confined their opposition to the merits of the claim for attorney's fees, without regard to the amount.

Although the underlying facts have been thoroughly canvassed in two opinions of this court reported at 571 F. Supp. 1430 (S.D.N.Y. 1983) and 602 F. Supp. 940 (S.D.N.Y. 1985) and an opinion of the Court of Appeals, reported at 772 F.2d 1032 (2d Cir. 1986), with which familiarity is assumed, to aid understanding we will restate some of the basic facts.

This action was initially brought against the Masters, Mates & Pilots Pension Plan ("Plan"), its trustees and administrator, the International Organization of Masters, Mates & Pilots ("MM&P"), two employer bargaining organizations and six shipping companies. The far ranging and diverse allegations embraced antitrust violations, breach of MM&P's duty of fair representation, intentional infliction of mental anguish and emotional distress and arbitrary and discriminatory acts by the Plan in violation of Chambless' rights under ERISA. Determinations before and during the trial weeded out all allegations except the claim of infringement of ERISA's requirements by the Plan, and dismissed from the lawsuit all defendants except the Plan, its trustees and administrator.

The litigation was fiercely contested and bitterly contentious throughout. I do not doubt for one minute that plaintiffs have expended almost \$1 million in lawyers' time during the six years this litigation has been on file here; however, as the various

opinions and evidentiary rulings of the court attest, most of that time was spent by plaintiffs in the futile attempt to establish the complaint's broad but unsupportable allegations.

Captain Chambless' legitimate and justified claim that he had been unfairly and discriminatorily treated by the Plan, its trustees and administrator was inflated into a grandiose challenge to MM&P and the shipping companies bound to it by collective bargaining agreement. There were originally seven lawyers involved as defendants' counsel. Moreover, the assertions were often unclear, and the legal theories on which they were based ranged from difficult to impossible to comprehend. Indeed, the grand scale allegations of Sherman Act infringement and violations of the duty by MM&P of fair representation and other alleged violations of plaintiffs' rights threatened to swallow and obfuscate plaintiffs' ERISA contentions, the only viable allegations plaintiffs could rightfully assert.

Had this case been brought solely to vindicate Captain Chambless' claim to appropriate pension benefits, I would have no hesitancy in awarding attorney's fees, since I am satisfied that he was treated badly to serve the political purposes of MM&P. However, that case would not have taken, as this one has, six years from institution to the present stage. Discovery would have been limited to ERISA issues. The only defendants in that litigation would have been those now remaining in the case — the Plan, its trustees and administrator — and the fees and expenses requested would have been far short of the more than \$1 million now being sought.

Moreover, as defendants point out, the contentions concerning pension rights were also asserted in a class action — *Deak v. Masters, Mates & Pilots Pension Plan* — in the United States District Court for the Middle District of Florida, while this case was pending here. The Florida case was certified as a class action including "... all members of the Masters, Masters & Pilots Pension Plan who have qualified for 'Normal' or 'Regular' retirement, are under 65 years of age and have no retired."

After class certification in *Deak*, defendants moved for a stay of this action pending a decision in *Deak*. On June 10, 1981, the court denied the motion on the grounds that some of the defendants in this case were not defendants in the Florida case and substantial identity between the two cases was held to be missing because of the narrow focus of *Deak* and more expansive allegations before the court in this case. In addition *Deak* was found to be an equity action which would be tried to the court, while this case was to be tried by a jury, "a central right in the legal system", slip op. June 10, 1981 at 5.¹

On or about September 27, 1982, plaintiffs moved to intervene in *Deak* for the purpose of seeking an order declaring Chambless not to be a member of the class certified in *Deak* or, in the alternative, permitting him to opt out of the class. The court granted the motion on December 7, 1982: "Arthur Chambless shall not hereafter be considered to be a member of the class, and any judgment entered in this action shall not be binding on him." See Order of December 7, 1982, Appendix C to Plevan Affidavit.

In *Deak*, Amendment 46 to the Plan was ultimately held to be illegal under ERISA in part because the "[t]rustees drew a distinction between certain types of re-employment in the industry primarily to protect MM&P by discouraging members who were eligible for their pension from accepting any job which benefited a competing union." See *Deak*, slip op. at 15. In striking down Amendment 47, this court adopted the reasoning of *Deak*. Amendment 47 was found "not in the interest of the Plan participants or their beneficiaries and . . . not necessary to maintain the financial integrity of the [pension] fund." 602 F. Supp. at 913.

Both amendments were adopted on August 24, 1976. Amendment 46 applies to retirees and Amendment 47 applies to those licensed deck officers not yet retired. In either case, if the retiree or non-retiree works as a licensed deck officer on a vessel owned by a company not contributing to the MM&P Plan, he forfeits the right to receive a pension until age 65. Had Chambless intervened in *Deak*, that court could have dealt with both Amendments and in any event had the claims in this case been

realistically tailored to the viable ERISA allegations, it would have been clear that judicial economy would have been furthered by staying the action in this case pending a determination in *Deak*.

An award of attorney's fees pursuant to § 502(g) of ERISA, 29 U.S.C. § 1132(g) "is discretionary, not mandatory." *Fase v. Seafarers Welfare and Pension Plan*, 589 F.2d 112, 116 (2d Cir. 1978); *Bittner v. Sadoff & Rudoy Industries*, 728 F.2d 820, 829 (7th Cir. 1984) (unlike a racial minority, "pension plan participants and beneficiaries [do not] constitute a vulnerable group whose members need special encouragement to exercise their legal rights . . ."). See also *Iron Workers Local No. 272 v. Bowen*, 624 F.2d 1255, 1265 (5th Cir. 1980).

In *Miles v. New York State Teamsters Conference Pension & Retirement Fund*, 698 F.2d 593, 600 (2d Cir.), *cert. denied*, 464 U.S. 829 (1983) five factors relevant to an attorney's fee award under ERISA were listed: (1) the degree of culpability or bad faith; (2) ability to satisfy the award; (3) the deterrence factor; (4) the merits of the parties' positions; and (5) whether the action sought to confer a common benefit. While none of these factors is necessarily decisive, together they constitute the considerations that a court should have in mind in making an ERISA attorney's fee award determination.

In this case the first four factors must be decided in plaintiffs' favor. Defendants are surely guilty of bad faith. The Trustees of the Plan are union and employer representatives. Amendment 47, along with Amendment 46, was proposed in 1976 by the union representative trustees. The amendment was not proposed to protect the corpus of the pension fund or to further the interests of the Plan participants. The principal purpose was to further union politics. Thus, there is culpability on the part of the Plan trustees.

The Plan can absorb an award of reasonable attorney's fees, and an award would act as a deterrent to future political manipulation of the Plan by either union or shipowner trustees.

However, since the litigation was not brought to confer any common benefit, but was specifically tailored to the particular interests and claims of the Chamblesses, the fifth factor is not satisfied. However it is unlikely that Amendment 47 will survive or be applied in the future in light of the holding in this case. The case has thus effected a common benefit even though not brought for that purpose. Had this case been limited to vindication of ERISA rights this court would have been able to find the result sufficient to meet this fifth *Miles* standard and to award attorney's fees to plaintiffs.

However, plaintiffs' expansive approach has vexatiously and wastefully increased the defendants' costs and legal fees in defending against this lawsuit. See *Nemeroff v. Abelson*, 620 F.2d 339 (2d Cir. 1980). Whatever plaintiffs might have secured in attorney's fees for litigation limited to a vindication of Chambless' pension benefits has been exceeded by far in costs and expenses plaintiffs have required defendants to expend in defending against their claims. Under these circumstances the court in the exercise of its discretion finds that an award of attorney's fees to plaintiffs is not warranted. Accordingly, the motion is denied.

Defendants' motion for discovery as to the sources from which funds have come to enable plaintiffs to prosecute this litigation is mooted by the court's determination. In any event, the motion would have to be denied on the merits since there is no justification for allowing such discovery, which would launch us into additional and peripheral litigation that would extend the life of this overlong litigation for several more years.

IT IS SO ORDERED.

Dated: New York, New York
June 23, 1986

/s/ Robert L. Carter

ROBERT L. CARTER
U.S.D.J.

NOTES

1. Ironically, the issues mandating a jury trial were taken from the jury at the close of plaintiffs' case and dismissed on the basis of legally insufficient evidence. The only remaining issues were the ERISA claims which had to be tried to the court. Thus, this case and *Deak* ended in the same posture.

Enhancement of Memorandum Endorsement
of the
Hon. Robert L. Carter, U.S.D.J.
(Original not reproducible)

4/22/86

Motion is denied.

So Ordered:

/s/ Robert L. Carter
U.S.D.J.

[Stamped filed: April 23, 1986]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 994, 1086 — August Term, 1984

(Argued: May 20, 1985 Decided: August 28, 1985)

Docket Nos. 84-7987, 7989

ARTHUR CHAMBLESS and MILDRED H. CHAMBLESS,
Plaintiffs-Appellees,
Cross-Appellants,

—v.—

MASTERS, MATES & PILOTS PENSION PLAN, STEPHEN P. MAHER, Administrator of the Masters, Mates & Pilots Pension Plan, C.J. BRACCO, RICHARD M. CASSELBERRY, MICHAEL DI PRISCO, E. GRAS, GEORGE GROH, JUSTIN GROSS, JAMES R. HAMMER, JAMES J. HAYES, MARTIN F. HICKEY, CHARLES JESS, FRANCIS E. KYSER, CHARLES LANDRY, ORION A. LARSON, ROBERT J. LOWEN, LLOYD MARTIN, J. ERIC MAY, DAVID MERRITT, THOMAS E. MURPHY, HENRI L. NEREAUX, WILLIAM OTT, MARTIN PECIL, FRANKLIN J. RILEY, JR., WILLIAM I. RISTINE, A. C. SCOTT, CAPT. JOHN SMITH, RUPERT SORIANO, ERNEST SWANSON, MICHAEN SWAYNE, ALLEN TAYLOR, NICHOLAS TELESMANIC, KENNETH P. WENTHEN, C.E. WHITCOMB, in their fiduciary capacity as Trustees of the Masters, Mates & Pilots Pensions Plan,

Defendants-Appellants,
Cross-Appellees,

AMERADA HESS CORPORATION, AMOCO SHIPPING COMPANY,
CENTRAL GULF LINES, INC., AMERICAN MARITIME
ASSOCIATION, NATIONAL TRANSPORT CORP., WABASH
TRANSPORT, INC., WATERMAN STEAMSHIP CORPORA-
TION, MARITIME SERVICES COMMITTEE, INC., INTER-
NATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS,
Defendants, Cross-Appellees.

Before:

FEINBERG, *Chief Judge*, VAN GRAAFEILAND and
PIERCE, *Circuit Judges.*

Appeal from an order of the United States District
Court for the Southern District of New York, Carter,
Judge, which held that appellees' pension benefits were
improperly postponed and reduced based on an arbitrary
and capricious amendment to the pension plan.

Affirmed and remanded.

ARTHUR M. WISEHART, New York, New York
(Irene M. Opsahl, John Whittlesey, Wise-
hart & Koch, New York, N.Y., of counsel),
for Plaintiffs-Appellees, Cross-Appellants.

BETTINA B. PLEVAN, New York, New York
(Eileen Reinhardt, Joseph Baumgarten,
Proskauer, Rose, Goetz & Mendelsohn,
New York, N.Y., of counsel), *for Defen-
dants-Appellants, Cross-Appellees.*

BURTON M. EPSTEIN, New York, New York
(Steinberg & Tugendrajch, Hal R. Gins-
burg, Levy & Tolman, New York, N.Y.,
of counsel), *for Defendant, Cross-Appellee*
International Organization of Masters,
Mates & Pilots.

PIERCE, *Circuit Judge:*

The Masters, Mates & Pilots Pension Plan, et al. (MM&P or the Plan) appeal from an order of the United States District Court for the Southern District of New York (Carter, *Judge*), dated August 2, 1984, which found that plaintiff Arthur Chambless' pension benefits were improperly postponed and reduced pursuant to an arbitrary and capricious amendment to the pension plan of which he and his wife are beneficiaries. The district court declared the amendment to be a nullity.

We hold that the district court was correct in finding that the amendment in question, while not violative of section 203 of ERISA, 29 U.S.C. § 1053(a), is arbitrary and capricious and is therefore a nullity and also that the amendment would cause an unlawful reduction of Chambless' wage-related benefit. Furthermore, in our view, the arguments made by plaintiffs in their cross appeal are without merit.

We affirm the decision of the district court.

BACKGROUND

The Plan, established in 1955, is a multi-employer plan designed to provide pension benefits to licensed deck officers who retire from sailing in the American Merchant

Marine. It is jointly administered by an equal number of employer-designated and International Organization of Masters, Mates & Pilots (Union)-designated Trustees, in accordance with section 302(c)(5) of the Labor Management Relations Act of 1947, 29 U.S.C. § 186(c)(5), and regulations adopted by the Trustees of the Plan (Plan Regulations). The daily administration of the Plan, however, has been delegated to an administrator. Stephen Maher, now Executive Director of the Plan, functioned as Administrator from 1965-81. The Administrator decides initially whether an applicant satisfies the Plan's eligibility requirements and determines the appropriate pension benefit the applicant is entitled to receive. The funds used to provide benefits under the Plan are contributed solely by the participating employers.

In order to receive pension benefits, a participant with a sufficient number of pension credits must "retire" within the meaning of the Plan Regulations. The pertinent portion of the definition of retirement in effect during the period in question herein, i.e., April 1977, as set forth in Article II-A, Section 15(a) of the Plan Regulations stated: "To be considered retired, a person must withdraw completely from any further employment, in any capacity, aboard any vessel whatsoever."

As for the amount of pension benefits to be received, Article II-A, Section 3, of the Plan Regulations, adopted as Amendment 15 in 1966 as a result of collective bargaining, provides for wage-related pension benefits based on the "average base monthly wages of the employee during the period of any 5 consecutive years within the last ten years immediately preceding the effective date of the pension, which will produce the highest average for the employee."

On August 26, 1976, the Trustees adopted Amendments 46 and 47 as new Plan Regulations (the Amendments). Amendment 46 relates to individuals who have at one time retired. It states in pertinent part:

If a Pensioner works in employment forbidden by this Section,

1. He shall not be entitled to pension benefits for any month of such employment and for six additional months, provided that the additional six month period shall not extend beyond his Normal Retirement Age . . . ; provided further, however, that if such employment is in the capacity of a Licensed Deck Officer on a U.S. flag ocean-going vessel employed by a company which is not a participant in the M.M.&P. Pension Plan or the MM&P PMA Pension Plan . . . , then the Pensioner shall not be entitled to pension benefits for any month of such employment nor for any months prior to such Pensioner reaching his Normal Retirement Age

Amendment 47, on the other hand, relates to individuals prior to retirement. It states:

In the event a Participant, subsequent to his accrual of credit for 10 years of vesting service and prior to his retirement, is employed in the capacity of a Licensed Deck officer on a U.S. flag ocean going vessel employed by a company which is not a participant in the M.M.&P. Pension Plan or the MM&P PMA Pension Plan . . . , such Participant shall not be entitled to any pension benefits prior to his reaching his Normal Retirement Age, as defined in Article I, Section 13.

In 1975, the Plan had already adopted Amendment 42, pursuant to which Article I, Section 13, stated that " 'Normal Retirement Age' shall mean the age of 65, or, if later, the age of the Participant on the tenth anniversary of his participation."

As the district court noted, Amendments 46 and 47, adopted during the following year, were discussed in articles by Robert Lowen, then the Plan's Secretary-Treasurer, and Stephen Maher, the Plan Administrator, which were published in the October 1976 issue of the Plan's newspaper, the *Pilot*. The articles highlighted the Plan Regulations' ban on prohibited employment and discussed the meaning of the Amendments. One of the articles contained the full text of the two provisions. The December 1976 issue of the newspaper further discussed the Amendments. Copies of the newspapers were distributed at Union hiring halls, and, according to the Plan, were mailed to the homes of Union members and pension participants.

Plaintiff Chambless sailed as a member of the Union from 1944 until 1977. He worked, at various times, as a third mate, second mate, chief mate, and master. In November, 1976, Chambless applied for pension benefits, but shortly thereafter withdrew his application and continued employment aboard vessels covered by collective bargaining agreements with the Union.

On April 2, 1977, Chambless filed a second application for retirement benefits. Chambless received a letter from Maher, Administrator of the Plan, informing him of the Plan's definition of retirement. On June 30, 1977, a Plan employee wrote to Chambless, informing him that his application was being considered and that his monthly benefits would be approximately \$920, presumably based on his 33 $\frac{1}{4}$ years of pension service credits as of April 2,

1977 and his average salary for his five highest salary years between 1967 and 1977.

Following an inquiry from Maher, in November 1977, Chambless informed the Plan that, between March 18, 1977 and April 1, 1977 and then again between April 4, 1977 and September 13, 1977, allegedly after asking a Union agent whether there would be any Union problem created in doing so, he had been employed as a master on vessels which did not participate in the Plan. According to Chambless, such employment was necessary as a result of the Union exerting pressure on older licensed deck officers to retire, by giving them only low paying and low grade assignments. Whereas between 1966 and 1975 Chambless had regularly received assignments as chief mate or master, subsequently, he allegedly was told to retire or to accept assignments as second or third mate.

By letters dated January 26, 1978 and January 28, 1980, Maher responded to Chambless and to his attorney stating that: 1) because Chambless had not retired under the Plan's definition of retirement, he was not eligible for a pension at that time; 2) pursuant to the definition of retirement in Article II-A of the Plan Regulations and pursuant to Amendment 47, the Plan would not pay him any pension until December 7, 1986, at which time Chambless would reach age 65, which the Plan defines as "normal retirement age"; and 3) the monthly benefits he could expect upon reaching 65 would likely be \$470.

On June 24, 1980, Chambless brought this suit against the Plan, Plan Administrator Stephen Maher, the Union, the Plan's employer and Union Trustees, the Maritime Services Committee and the American Maritime Association, employer organizations that do collective bargaining for shipping companies, and six shipping companies that

formerly employed Chambless, have contracts with the Union, and contribute to the Plan.

In his complaint, Chambless alleged that the Plan violated Section 203 of ERISA, 29 U.S.C. § 1053(a), by suspending payment of his vested pension after he went to work on a non-MM&P vessel. Moreover, according to Chambless, even if the Plan had the right to suspend pension payments when a retiree returned to work, it did not have the right to continue the suspension after the Plan participant went back into retirement. In addition, Chambless asserted that the Regulations would cause a forfeiture of his benefits by reducing them from an estimated \$920 per month beginning at age 55 to an estimated \$470 per month, beginning at age 65.

Among other allegations, Chambless also contended that: Amendment 47, by discriminating against Plan participants who worked on non-MM&P vessels, was punitive and arbitrary and capricious and therefore violated the trustees' fiduciary duties; the selection of age 65 for normal retirement age was a sham; at no time before he took employment on a non-MM&P vessel did the Plan or Union notify him of the effect of Amendment 47 on participants who took such employment; defendants inadequately reviewed his retirement application; the Plan improperly withheld information from him; defendants conspired in restraint of trade in violation of the Sherman Act; defendants, because of the assurances they allegedly gave him about accepting employment on non-MM&P vessels, were estopped from denying him benefits; the Union had breached its duty of fair representation by discriminating against senior seamen; and the plaintiffs had suffered emotional distress as a result of defendants' actions.

Chambless sought payment of his pension benefits retroactive to May 1, 1977, damages of \$100 per day for the defendants' failure to provide him with certain pension information, treble antitrust damages, and punitive damages, costs, and attorneys' fees.

By opinion dated September 14, 1983, the district court granted defendants' motion for summary judgment on the following claims made by Chambless: that the Plan's review of his application was inadequate; that defendants were guilty of violating the Sherman Act; that the Plan improperly withheld information from him; that the selection of age 65 as the normal retirement age was a sham; and that defendants were estopped from suspending his benefits.

As for Chambless' claim that his benefits were forfeited by reducing them from \$920 a month to \$470 a month, the district court held that Chambless has no vested right to a \$920 a month pension and that Amendment 47 did not violate the nonforfeitability requirements of ERISA. The court did find, however, that there was a dispute over the material issue of whether the provisions which caused Chambless' pension to be reduced were arbitrary and capricious and, therefore, the court denied summary judgment on this issue.

Similarly, as for Chambless' argument that he did not receive notice of the Amendment and its effect, the district court held that there was a dispute over the material issue of whether the Union took reasonable steps to ensure that Chambless was notified after the passage of Amendments 46 and 47 and before he took work prohibited under those Amendments. The court therefore also denied summary judgment on this issue.

At trial, a jury was empanelled to consider the claims for breach of the duty of fair representation, emotional distress, and compensatory and punitive damages. At the close of the plaintiffs' case, these claims were taken from the jury, dismissed by the court, and the jury was discharged.

The only issue remaining for determination was whether the forfeiture of Chambless' pension benefits until age 65 was arbitrary and capricious. Finding that the regulation pursuant to which Chambless' benefits were reduced "is not in the interest of plan participants or their beneficiaries and is not necessary to maintain the financial integrity of the fund," Judge Carter, by order dated October 29, 1984, held that Amendment 47, as applied to Chambless, was arbitrary and capricious and ordered the Trustees to treat Chambless' application as if it had been made in 1977 and to grant him a wage-related pension based on his 1967-77 employment record, provided he retired and filed for benefits within six months of the date of the decision by the district court or within six months of a determination by the Court of Appeals, if the decision were appealed.

On appeal, the Plan contends that: 1) Amendment 47 is not arbitrary and capricious and therefore should not have been declared a nullity; 2) Amendment 47 did not cause an unlawful reduction of Chambless' wage-related benefit; and 3) the Plan gave adequate notice of the Amendment. Chambless and his wife cross appeal, contending that: 1) Amendment 47 is not only arbitrary and capricious but also violates section 203 of ERISA, 29 U.S.C. §1053(a) which prohibits forfeiture of all vested pension benefits at normal retirement age; 2) the Plan should be estopped from not paying Chambless the

pension benefits he would have received had he retired in 1977; 3) the district court erred in dismissing his antitrust claim against defendant shipping companies; 4) the district court erred in dismissing the plaintiffs' claims for intentional infliction of emotional distress; 5) the district court erred by not awarding Chambless benefits retroactive to May 1, 1977 and by conditioning its judgment upon his retirement and filing for benefits within six months of the date of the court's decision; and 6) the district court erred in dismissing the plaintiffs' claim for punitive damages.

Finding that Amendment 47 was arbitrary and capricious, the district court declared the Amendment to be a nullity. See *Sharron v. Amalgamated Insurance Agency Services, Inc.*, 704 F.2d 562, 564 (11th Cir. 1983). We agree with this determination.

DISCUSSION

Section 404(a) of ERISA, 29 U.S.C. § 1104(a)(1), states that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries" The Plan contends that Amendment 47 is justifiable, pursuant to § 1104(a)(1), in that it was adopted to enhance the financial integrity of the Plan. According to the Plan, the purpose of Amendment 47 is to preserve and enhance the corpus of the Plan by discouraging participants from making their services available to non-contributing employers. Also, the Plan purportedly believed that the Amendment would induce non-contributing employers to participate in the Plan in order to obtain access to trained licensed deck officers and would thereby decrease the claimed unfunded liability of the Plan. We find the Plan's argument unpersuasive.

First, the Plan failed to substantiate its claim of financial necessity and even failed to assert that alternative solutions were considered. See *Central Tool Company v. International Association of Machinists National Pension Fund, Benefit Plan A*, 523 F. Supp. 812, 817-18 (D.D.C. 1981). Second, the Plan's claim of financial necessity was unsupported by any actuarial data. See *Elser v. I.A.M. National Pension Fund*, 684 F.2d 648, 657 (9th Cir. 1982), cert. denied, 104 S. Ct. 67 (1983); *Pompano v. Michael Schiavone & Sons, Inc.*, 680 F.2d 911, 914-15 (2d Cir.), cert. denied, 459 U.S. 1039 (1982). The Plan points to an actuarial valuation by its consultants for the year ending December 31, 1975. According to Chambless, and not contested by the Plan, however, this valuation was not even transmitted to the Plan until February 22, 1977, approximately six months after the Trustees' action that was assertedly "based in part" upon it. Moreover, the Plan's concern for its financial stability is undermined by a letter written by defendant Maher, the Plan Administrator, to participants only a month before Amendments 46 and 47 were adopted, in which Maher stated that the Plan was "financially sound." Third, as the district court noted, Amendment 47 was of Union origin, drafted by Union counsel, and the record is devoid of evidence showing that the Amendment benefited the Plan or its participants. Rather, evidence was introduced demonstrating that employer Trustees supported the Amendment to encourage participants to remain working as long as possible for employers who had contributed to the Plan, so that the employers could get their money's worth, whereas Union Trustees supported the Amendment to attract younger licensed deck officers. Neither the employer nor Union Trustees seemed to support the Amendment to enhance the financial integrity of the Plan itself. Fourth, we

note that in addressing a class action challenge to companion Amendment 46, a district court in *Deak v. Masters, Mates & Pilots Pension Plan*, No. 79-190, slip op. (M.D. Fla. June 4, 1984), determined that the Plan's assertions regarding the financial purpose of Amendment 46 "d[id] not mesh with the bulk of the evidence and inferences indicative of their intentions at the time of actual passage." *Id.* at 16. Given the basic similarities between Amendments 46 and 47 and the fact that they were adopted at the same time, we conclude that the district court herein was correct in finding that Amendment 47 also was not adopted to enhance the financial integrity of the Plan or to benefit the Plan participants and is thus arbitrary and capricious.

The district court also concluded that, as to one in the position of plaintiff Chambless, the combined effect of Amendment 47 and Article II-A, Section 3 of the Plan Regulations (the wage-related provision) was arbitrary and capricious.

Article II-A, Section 3, of the Plan Regulations sets forth the monthly wage-related pension benefit as a percentage of pay and defines pay as "the average base monthly wages of the employee during the period of any 5 consecutive years within the last ten years *immediately preceding the effective date of the pension . . .*" (emphasis added). Furthermore, according to this wage-related provision, a participant with thirty years of credit is to receive monthly pension benefits of \$470 or 60% of pay, whichever is higher. Since the base years for calculating the wage-related pension are the ten years immediately prior to retirement and not necessarily the last ten years in covered employment, the ten years in question in Chambless' situation are the years during which he was

employed at a low rate of pay on non-MM&P vessels. Since 60% of Chambless' pay in the 5 highest paying years within the statutory period would be less than \$470, his monthly pension would thus be \$470. Consequently, by postponing benefits until age 65, pursuant to Amendment 47, and then utilizing the wage-related formula to calculate those benefits, the amount of Chambless' pension was significantly reduced.

We agree with the district court that, by itself, Article II-A, Section 3, the wage-related provision, might not be arbitrary and capricious with regard to participants who apply for benefits immediately upon retiring and who do not take any other employment, and similarly with regard to participants who retire from covered employment, apply for a pension and then take work in a different industry. When Article II-A, Section 3 is applied in conjunction with Amendment 47, however, as occurred here, we believe it is arbitrary and capricious. Here, the combined effect of Amendment 47 and the wage-related provision essentially meant that Chambless, by accepting other work with a competitor who did not participate in the Plan, even for the purpose of avoiding the low paying and low grade assignments the Union was giving to older licensed deck officers, was placed in the position of postponing his pension until age 65 and thus could not have sought to fully retire beforehand, and he also was effectively reducing his pension benefit. In our view, the district court correctly held that no forfeiture of benefits can be exacted from an employee for attempting to improve his position by accepting work with a competitor of his employer. *Hummel v. S.E. Rykoff & Co.*, 634 F.2d 446, 452 (9th Cir. 1980); *Westwood Chemical Co. v. Kulick*, 570 F. Supp. 1032, 1041-42 (S.D.N.Y. 1983).

Moreover, contrary to the Plan's contention, this Court's decision in *Morse v. Stanley*, 732 F.2d 1139 (2d Cir. 1984), stands for the proposition that suspension of benefits is permissible only if those benefits are not thereby reduced. As we stated, "[c]onsidering that . . . the plaintiffs . . . will each receive their vested benefits with interest upon reaching their normal retirement age (65), their contention that the Trustees acted arbitrarily or in bad faith in denying them accelerated distributions is without merit." *Id.* at 1144. Defendants' reliance on the *Morse* decision is misplaced.

Furthermore, even if the Plan is correct in maintaining that the wage-related provision of the Plan Regulations, since it is the result of a collective bargaining agreement, may not be found to be arbitrary and capricious in itself, *United Mine Workers of America Health & Retirement Funds v. Robinson*, 455 U.S. 562, 576 (1982), as the district court stated, it is not the wage-related provision which is being contested herein. Moreover, as Chambless notes, *Robinson* is limited to a situation in which the provision in question is both an outgrowth of a collective bargaining agreement and not otherwise violative of federal law or policy. *Id.* at 575. Here, the wage-related provision, Article II-A, Section 3, as applied to the present circumstances, i.e., combined with Amendment 47, would violate the Trustees' fiduciary duty to act solely in the interest of the participants and beneficiaries, as required by ERISA, 29 U.S.C. § 1104(a). For the foregoing reasons, we agree with the district court's finding that Amendment 47 is arbitrary and capricious and is therefore a nullity.

With regard to notice, the district court held that both the method of distributing notice about the impact

of the Amendment and the content of the notice were inadequate.

Regarding the adequacy of distributing information about Amendment 47, while defendants contend that the newspaper was mailed to all participants at their homes, the district court found that the newspapers discussing the Amendment were merely left at the Union hiring hall and were not mailed directly to Plan participants. The district court therefore held that such distribution was inadequate.

We believe that, even if distribution of the newspaper were adequate, the content of the notice regarding Amendment 47 was inadequate. We are unpersuaded by defendants' contention that because the method of calculating wage-related benefits had not changed since its introduction in 1968 and because Chambless received notice of that method at that time, no new notice by the Plan was required. Rather, as the district court found, neither of the publications regarding Amendment 47 explained the full import of the interaction of the wage-related provision and the Amendment for someone in Chambless' position. Thus, in our view, the notice was insufficient to satisfy the requirements of ERISA, 29 U.S.C. § 1022(a) and (b) and § 1024(b)(1) (plans must furnish to participants clear, timely explanations of "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits.").

In his cross-appeal, Chambless makes several claims. First, he contends that the suspension of his pension until age 65 violates section 203(a) of ERISA, 29 U.S.C. § 1053(a), which states in pertinent part: "Each pension plan shall provide that an employee's right to his normal

retirement benefit is nonforfeitable upon the attainment of normal retirement age" According to Chambless, he is entitled to a "normal pension," without regard to age, since he has over twenty years of pension service credits. We find Chambless' argument to be without merit. While prior to 1975, age was not a factor in determining entitlement to pension benefits, in December 1975, the Plan adopted Amendment 42, which tracks the language of ERISA and pursuant to which Article I, Section 13 states that "'Normal Retirement Age' shall mean the age of 65, or, if later, the age of the Participant on the tenth anniversary of his participation."

In addition, we have held that postponement of retirement benefits until age 65 need not constitute an unlawful forfeiture, violative of ERISA. *Riley v. MEBA Pension Trust*, 452 F. Supp. 117, 120 (S.D.N.Y.), *aff'd*, 586 F.2d 968 (2d Cir. 1978) ("The Act, on its face, requires only that pension benefits be nonforfeitable upon attainment of normal retirement age, in this case, age sixty-five. The Act, therefore, gives plaintiff no vested right to receive benefits until he reaches that age."); *see Fine v. Semet*, 699 F.2d 1091, 1093 (11th Cir. 1983); *Hurn v. Retirement Fund Trust*, 648 F.2d 1252, 1253-54 (9th Cir. 1981). Based on the above, we conclude that, since Chambless has not reached age 65, suspension of his benefits violates neither ERISA nor the Plan itself.

Chambless next maintains, in his cross-appeal, that the Plan should be estopped from not paying him the pension benefits he would have received had he retired in 1977 and not worked for non-MM&P vessels. Chambless alleges that it was only after asking a Union agent whether it would be permissible for him to do so, that he took an assignment as master on a vessel that did not participate in the Plan.

In our view, Chambless' allegations regarding representations made to him by a Union representative are insufficient to support a claim of estoppel against the Plan. We have held that because "[t]he actuarial soundness of pension funds is, absent extraordinary circumstances, too important to permit trustees to obligate the fund to pay pensions to persons not entitled to them under the express terms of the pension plan," *Phillips v. Kennedy*, 542 F.2d 52, 55 n.8 (8th Cir. 1976) (quoted in *Haeberle v. Board of Trustees of Buffalo Carpenters Health-Care Funds*, 624 F.2d 1132, 1139 (2d Cir. 1980)), "courts have been reluctant to apply the estoppel doctrine to require the payment of pension funds." *Haeberle*, 624 F.2d at 1139. As the district court stated herein, "[i]f such funds are too vital to allow plan trustees to obligate the fund through their representations, *a fortiori* union officials—who are not as clearly identified with pension funds as are trustees—should not be permitted to commit the funds to persons not entitled to them." *Chambless v. Masters, Mates & Pilots Pension Plan*, 571 F. Supp. 1430, 1452 (S.D.N.Y. 1983); see *Galvez v. Local 804 Welfare Trust Fund*, 543 F. Supp. 316, 318 (E.D.N.Y. 1982). We agree with the position articulated in *Chamberlin v. Bakery & Confectionery Union Pension Fund*, 99 L.R.R.M. 3176 (N.D. Cal. 1977), where the court stated:

To permit . . . a single oral statement by a union business agent to obligate the trust to provide benefits to persons not otherwise entitled to them would seriously erode the requirement that the fund be administered by representatives of both the employe[r] and the employees solely for the benefit of employees of the contributing employer. 29 U.S.C. § 186(c)(5). Any such erosion can create a loophole that would enable the unscrupulous to divert funds away from the proper parties

Id. at 3180.

Furthermore, as the district court noted, Chambless admits that he never discussed with any Union representative the specific effect that employment on non-MM&P vessels would have on his pension, as opposed to whether the Union itself would object to such employment. 571 F. Supp. at 1451. Rather, according to Chambless' testimony, the Union representative merely told Chambless that "lots of our members does [sic] that [i.e., work on non-MM&P vessels] Don't worry about it You go right ahead if you want to go out there and work"

Based on the above, we believe that the district court correctly granted summary judgment dismissing the claim that the Plan is estopped from suspending Chambless' benefits.

Chambless' third contention in his cross-appeal is that the district court erred in dismissing the antitrust claim against the shipping companies. According to Chambless, the suspension of pension benefits until normal retirement age under Amendment 47 and the decrease in those benefits created "a hindrance and interference with the ability of licensed deck officers to market their skill," thereby creating an antitrust violation under the Sherman Act, 15 U.S.C. §§ 1-2.

The Supreme Court has held that, even if there has been a violation of the antitrust laws, an award of treble damages is proper only when there has been an antitrust injury. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Chambless has not made clear exactly what his antitrust injury is. To the extent that Chambless' antitrust claim is based on a limiting of employment opportunities, he can claim no direct injury in light of his successful continued employment on non-MM&P vessels. To the extent that the claim is based on

diminished retirement benefits, it is essentially an ERISA matter. See *Laurie Visual Etudes, Inc. v. Chesebrough-Ponds, Inc.*, 473 F. Supp. 951, 960 (S.D.N.Y. 1979). We therefore hold that Chambless has not shown the requisite antitrust injury.

Chambless' fourth contention in his cross-appeal is that the district court erred in dismissing the plaintiffs' claims for intentional infliction of emotional distress against the Plan and the Union. We believe these claims were properly dismissed. With regard to the claim by Chambless' spouse, we believe that the district court did not abuse its discretion in finding that there was insufficient evidence to raise a jury question. With regard to Chambless' own action to recover damages based upon alleged emotional distress, we believe that the claim was properly dismissed because of the absence of any evidence to support his claim.

Chambless' fifth contention in his cross-appeal is that, based on the district court's findings, he should have been awarded benefits retroactive to May 1, 1977 and also that the district court erred in conditioning its judgment upon his retiring and filing for benefits within six months of the date of the court's decision. We agree with the district court. Regarding retroactivity, as the Plan states, because Chambless has worked continuously in the maritime industry since May 1, 1977, and has not "withdraw[n] completely from any . . . employment . . . aboard any vessel whatsoever," as required by Article II-A, Section 15(a)'s definition of retirement, Chambless has not been eligible to receive a pension. We have upheld rules for suspending benefits of individuals who have not retired within the meaning of the Regulations. *Riley*, 570 F.2d at 412. We therefore believe that the district court was correct in not awarding retroactive benefits but instead

requiring the Plan to pay Chambless, upon his retirement, the monthly amount he would have received had he retired in 1977.

Regarding the six month proviso, we also agree with the district court. Even if Amendment 47 is a nullity, both the wage-related provision, Article II-A, Section 3, and the definition of retirement, Article II-A, Section 15(a), of which Chambless was on notice in 1977 when he applied for benefits, remain intact. Therefore, when Chambless applied for benefits in 1977, he is deemed to have known that: the amount of his retirement benefit would be based upon his salary during the ten year period immediately prior to his retirement; if he continued to work thereafter on non-MM&P vessels, his retirement date would continue to advance; and the amount of his pension probably would be reduced by virtue of adding to the ten year period an increasing number of years of uncovered and lower paying employment. Since the district court decision gives Chambless the advantage of figuring his wage-related benefits as of 1977, i.e., based upon his last years of higher paying covered employment, and not upon the ten year period immediately prior to his retirement, we believe it is reasonable for this advantage to be conditioned upon Chambless' ceasing to work and filing for benefits within six months of a decision rendered by this Court.

Finally, the plaintiffs contend that the district court erred in dismissing their claim for punitive damages. We disagree. The issue of the availability of punitive damages under ERISA is now before the Supreme Court in *Russell v. Massachusetts Mutual Life Insurance Co.*, 722 F.2d 482 (9th Cir. 1983), *cert. granted*, 105 S. Ct. 81 (1984). As defendants argue, even where courts have concluded that punitive damages are available under

ERISA, they have required a showing of wanton or malicious conduct, *see, e.g., id.* at 492; *Korn v. Levine Bros. Iron Works Corp.*, 574 F. Supp. 836, 843 (S.D.N.Y. 1983), of which there is no evidence herein. Indeed, the district court stated that it did "not believe that the trustees willfully withheld information from Chambless or other participants as to the effective reach and full impact of Amendment 47." Furthermore, we note that in *Deak*, slip op. at 20, in which related Amendment 46 was at issue, the court held that the Trustees' actions were not so "'malicious, flagrant or outrageous,' as to justify the imposition of punitive damages." (citations omitted). In our view, the district court herein was correct in making a similar finding with regard to Amendment 47 and in dismissing the plaintiffs' claims for punitive damages.

For the foregoing reasons, we affirm the decision of the district court in all respects and remand for a determination of the benefits which Chambless would have received in 1977.

ENDORSEMENT ORDER DATED NOVEMBER 30, 1984

ARTHUR CHAMBLESS and MILDRED H. CHAMBLESS

- against -

MASTERS, MATES & PILOTS PENSION PLAN, et al.

80 Civ. 4258 (RLC)

ENDORSEMENT

The motion is denied. Filing a motion to raise the kinds of questions brought up in the motion papers is simply a waste of time. All Captain Chambless is required to do is to certify to the plan administrator that he has withdrawn from all active employment in the maritime industry and wants to obtain his pension benefits. The form of the application is not important, and if the regular form is used, it is clear that there would be no need for him to answer questions that do not apply to his situation.

The apparent concern about the six month grace running out is groundless. If an appeal is taken, the six month grace is tolled. Under a narrow interpretation, the time would commence to run again after the Court of Appeals has rendered decision and issued its mandate to the district court. Under a more liberal interpretation, Captain Chambless would have six months from the date of the mandate of the Court of Appeals. This is all, of course, on the assumption that plaintiff prevails on appeal.

Under the court's judgment, Captain Chambless is entitled to receive in 1985 the wage related benefits he would have been entitled to receive in 1977. If 1977 pensioners similarly situated to Captain Chambless have received cost of living increments which increase their monthly benefits beyond the 1977 level, it may well be that Captain Chambless might be entitled to a monthly stipend with cost of living increments to bring him on par with other 1977 pensioners. It will be time enough to study that issue, if necessary, on remand. My opinion did not contemplate pension benefits for Captain Chambless retroactive to

1977. Mr. Garfield's approach was not considered. If this matter is appealed, plaintiff would be advised to raise those questions on appeal. Indeed, it would probably be prudent on plaintiff's part to cross-appeal, since a notice of appeal has been filed by defendant, in order to be certain that this matter is considered by the Court of Appeals. The issue of the cost of living increments does not appear to the court to necessitate a cross-appeal, but, again, prudence would dictate that the matter be presented to the court in brief and argument upon appeal.

Further, the court's advice would be for Captain Chambless to await the conclusion of the appellate process before applying for benefits. The attorney's fee issue should also be deferred until the case is again in this court on remand.

Finally, since this matter is now on appeal, it is suggested that the parties devote their time, effort and energy to the appeal. Whatever matters the court has to determine can await remand of this case to this court.

IT IS SO ORDERED.

Dated: New York, New York
November 30, 1984

/s/ Robert L. Carter
ROBERT L. CARTER
U.S.D.J.

ENDORSEMENT ORDER OF THE
HON. ROBERT L. CARTER,
DATED OCTOBER 26, 1984

ARTHUR CHAMBLESS and MILDRED CHAMBLESS –
against – MASTERS, MATES & PILOTS PENSION PLAN,
et al.

80 Civ. 4258 (RLC)

ENDORSEMENT

Plaintiff has moved for additional findings of fact by the court because of plaintiff's concern that adoption of Amendment 42 not be construed as having the effect of modifying eligibility for regular pension requiring 20 years of accredited service without regard to age. The first five proposed additional findings concern this issue. As the court stated in *Deak v. Masters, Mates and Pilots Pension Plan*, No. 79-190 Civ-T-H (N.D. Fla. August 18, 1982), there is nothing in Amendment 42 that purports to modify, amend or repeal Article II-A, Section 2 of the plan which provides for regular pension after 20 years accredited service without regard to age. The only change that Amendment 42 effected in re Article II-A, Section 2 was to change the 20 years of accredited service pension there referred to as "normal" to "regular". The normal retirement age of 65 referred to in Amendment 42 is the ERISA limit for any withholding of payment of accrued benefits in a pension plan. Plaintiff's fears, therefore, are groundless. Nor do I see a need for proposed finding 6 since, in light of the holding in this case, it is superfluous.

The Court agrees with defendants that the claim for attorney's fees must await a proper application and supporting data which defendants will be given full opportunity to oppose.

When the opinion in this case was filed on August 2, 1984, Chambless was given six months from the date of the opinion to reapply for his pension provided he ceased working in the maritime industry and certified he had done so. The court did not take into account that there could be a considerable hiatus between the filing of the opinion and the entry of judgment.

The court was unavailable until September. The parties have submitted proposed and counter proposed judgments, as well as the motion disposed of ante. The court has just taken up the matter. The intent of the opinion-in-chief was to allow Chambless six months to decide on his course of action. Without a judgment being entered, it is doubtful that he would have been entitled to take action to fulfill the court's condition. Accordingly, the opinion is modified to the extent that the trustees are ordered to approve Chambless' application for a pension provided he ceases working in the maritime industry and certifies that he has done so and applies for a pension within six months of the date of entry of judgment in this case.

IT IS SO ORDERED.

Dated: New York, New York
October 26, 1984

/s/ Robert L. Carter

ROBERT L. CARTER
U.S.D.J.

JUDGMENT DATED OCTOBER 29, 1984

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
80 Civ. 4258 (RLC)**

Filed October 29, 1984

**ARTHUR CHAMBLESS and
MILDRED H. CHAMBLESS,**

Plaintiffs,

- against -

MASTERS, MATES & PILOTS PENSION PLAN, et al.,
Defendants.

JUDGMENT

This action having been tried by the Court, Hon. Robert L. Carter, District Judge, presiding, on November 16 through November 23, 1983, and the Court having duly made and filed findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure, it is,

ORDERED AND ADJUDGED that

(a) the action forfeiting Arthur Chamblless' pension rights until he attains age 65 is declared a nullity;

(b) the trustees approve Arthur Chamblless' application for a pension provided he ceases working in the maritime industry, certifies that he has done so and applies for a pension within six months of the date of this Court's judgment (October 29, 1984) and that if he does so, the trustees will treat the application, for the purpose of calculating his wage-related pension, as if it had been made in 1977, thereby granting him a wage-related pension based on his 1967-1977 employment record;

(c) all other claims and causes of action asserted on behalf of plaintiffs are dismissed; and

(d) the Court retains jurisdiction of the parties and of this cause for the purpose of enforcing the judgment and making such further orders as are necessary.

Dated: October 29, 1984
New York, New York

/s/ Robert L. Carter

U.S.D.J.

THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON 10-30-84

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

80 Civ. 4258 (RLC)

Filed August 8, 1984

ARTHUR CHAMBLESS
and MILDRED H. CHAMBLESS,

Plaintiffs,

- against -

MASTERS, MATES & PILOTS PENSION PLAN, et al.,
Defendants.

OPINION

CARTER, District Judge

Background Facts

Plaintiff, Albert Chambless, became a member of the International Organization of Masters, Mates & Pilots ("MM&P") in 1944 after being issued a third mate's license. He is a resident of Alabama and received all of his MM&P work assignments through the union hiring hall in Mobile, Alabama. He obtained his master's license in 1956, and his first assignment as a master in August, 1966, when he was given command of the Frontenac Victory. This assignment lasted until May, 1968. Thereafter, Chambless regularly hired out as master or chief mate through 1975.

The MM&P pension plan ("plan") was established in 1955. It is an employer-funded pension and trust fund that provides retirement benefits for MM&P licensed deck officers. The plan is administered by an equal number of employee and employer designated trustees who have broad powers to formulate regulations for the administration

of the plan. The trustees have delegated the day to day operation of the plan to an administrator. Stephen Maher, now Executive Director of the plan, functioned as administrator from 1965-1981. The administrator decides initially whether an applicant satisfies the plan's eligibility requirements and determines the appropriate pension benefit the applicant is entitled to receive. His decisions are presented to the trustees for approval. The administrator's determination that an applicant is not entitled to benefits does not reach the trustees unless the applicant appeals, in which case the trustees then determine whether to uphold or reject the administrator's determination.

The trustees have formulated a large body of regulations governing the plan's operations. Prior to the enactment of ERISA, 29 U.S.C. § 100, *et seq.*, the plan's regulations provided for normal retirement without regard to age, after 20 years of pension service credits. Pursuant to the terms of the 1966 collective bargaining agreement, the plan was amended to provide for wage related pension benefits based on the average salary for the five highest salary years in the last ten years prior to the effective date of retirement.

Prior to August, 1976, retirement was defined in Article II, Section 13a of the plan regulations as complete withdrawal from "further employment in any capacity in the maritime industry", except that the trustees "in their sole discretion could permit [a retiree to work] in shoreside positions covered by a collective bargaining agreement by the [union], and upon application submitted through the [union], [to work] as a marine surveyor or employment aboard fishing vessels, yachts and other small craft (such as supply boats) provided employment [is] in a capacity, not covered by the collective bargaining agreements of the [union]."

Article II, Section 13(b) provided that if a retiree worked in employment forbidden by Section 13a, he forfeited his pension benefits for the month he worked and for six additional months. He had to return all benefits received and if he failed or refused to do so, all future benefits could be denied. The retiree had to notify the trustees in writing within 15 days of the commencement of forbidden employment, and the trustees were empowered to disqualify him permanently from receiving any future pension benefits if he failed to do so.

In December, 1975 the plan adopted Amendment 42 which added a new Section 13 to Article I. Normal retirement age was defined

as "age 65, or, if later, the age of the participant on the tenth anniversary of his participation. All references to 'Normal Pension' [were] changed to read 'Regular Pension'".

In 1976, Walter Anderson, who was in charge of the hiring hall in Mobile, Alabama, sought to induce Chambless to retire in accord with then current union policy. Anderson advised Chambless that the union wanted all the older licensed deck officers to retire and that if Chambless did not retire, he could expect to be shipped out on second or third mate assignments. During 1976 and 1977 all of Chambless' assignments through the Mobile, Alabama hiring hall were in second or third mate jobs. In a letter dated March 17, 1979, sent to all offshore ports, Robert Lowen, Union President, discussed the union's effort to secure non-wage related benefits and other incentives to induce older deck officers to retire.

Chambless apparently succumbed to the pressure and filed an application for retirement benefits on November 12, 1976, but then, having second thoughts, withdrew the application. On April 2, 1977, he filed a second application. At that time he was advised that his retirement benefits would be approximately \$920 per month. This calculation was presumably based on his 33 1/4 years of pension service credits as of April 2, 1977, and his average salary for his five highest salary years between 1967 and 1977, which appear to be 1970-1975 when he sailed two times as master (6/10/73-9/30/74 Hess Petrol; 7/1/75-11/24/75 Greenport) and five times as chief mate (1/1/70-2/11/70, Spirit of Liberty; 5/25/70-1/1/71, Golden Gate; 8/6/71-3/31/73 Hess Voyager; 4/9/73-6/9/73, Hess Petrol; 2/14/75-4/10/75, Hess Refiner).

Prior to filing his application, Chambless had accepted employment as a master (3/18/77-4/1/77) on the Mission Viking, a vessel owned by a company not a party to a collective bargaining agreement with MM&P. He testified that before accepting this assignment, he had spoken to the dispatcher at the union hiring hall in Mobile, Alabama and was advised that there would be no problem. Two days after the filing of his April 2, 1977 application, he accepted assignment as master on the Mount Explorer, another non-MM&P contract vessel. That assignment did not end until September 13, 1977. The Mission Viking was an oil drilling rig. The Mount Explorer was a U.S. flag ocean going vessel.

On August 24, 1976, the trustees adopted amendments 46 and 47 as new plan regulations. These amendments were proposed by union designated trustees and drafted by union counsel who advised the trustees that the two proposals were not at odds with any ERISA provision. Amendment 46 provides that retirees working in forbidden employment are not entitled to any pension benefits during such employment and for six months thereafter, provided the six month penalty does not extend beyond the retiree's normal retirement age. Moreover, if a retiree works as a licensed deck officer on a U.S. flag ocean going vessel owned by a company not participating in the MM&P plan, the retiree forfeits his pension benefits until normal retirement. Amendment 47 provides that an active member (i.e. one not yet retired) who, subsequent to acquiring 10 years of vesting service, works as a licensed deck officer on a United States flag ocean going vessel for a company not under contract with MM&P, shall not be entitled to any pension benefits until normal retirement age.

The two new amendments were discussed in articles by Robert Lowen, then MM&P Secretary Treasurer and Stephen Maher, plan administrator, published in the October, 1976 issue of the MM&P newspaper, *The Pilot*. Lowen's article called attention to the regulations' ban on prohibited employment. Maher's article highlighted the same theme in a short explanation of the amendments' meaning, and his article carried the full text of the two provisions. In a later article published in the December, 1976 issue of the newspaper, Maher again focused on the two regulations and discussed their importance.

Copies of the newspaper, distributed at union hiring halls in various ports from which the union operates, are not mailed to union members or pension participants. Booklets concerning the pension plan and explaining the regulations are sent to plan participants but the texts of neither the regulations or amendments are sent directly to union members. The first communication directly to the plan participants about Amendment 47 is a letter from Maher dated March 13, 1978, which states in pertinent part:

Further, subsequent to accruing ten (10) years of vesting service credit and prior to retirement, if you work as a Licensed Deck Officer aboard U.S. flag ocean going vessels which are operated by a company which is not a participant in an MM&P Pension Plan (excluding civilian employment with the Military Sealift

Command or another government entity) you will not be entitled to any pension benefits prior to reaching Normal Retirement Age (Normal Retirement Age means age 65 or, if after, the age of the participant on the tenth (10th) anniversary of his participation).

An excerpt of the Pension Regulations pertaining to vested pension credit is attached.

I urge you to read the attached language carefully, as violation of the Rules will affect payment of your pension benefit, as well as, any survivor's options.

Plaintiff's Ex. 38.

On July 19, 1977, Maher wrote asking Chambless to confirm or deny that he was working as a licensed deck officer on a ship not under MM&P contract. Defendants' Ex. M. Chambless replied in an undated letter confirming that he had accepted employment aboard a non-MM&P vessel and inquired whether his pension would be "payable as soon as he ceases such employment and withdraws completely from employment aboard a vessel." There is no direct reply to this latter inquiry in the record.

Chambless was subsequently advised by Maher that his pension application had been denied and that because of his acceptance of employment as a licensed deck officer with a company not under contract with MM&P, he had forfeited all rights to pension benefits until age 65. He was further advised that his estimated pension benefits at age 65 would be \$470 per month, not the \$920 figure previously given to him. Chambless appealed to the trustees who ratified the decision of the administrator.

The Claims Involved

Plaintiffs (Chambless and his wife) instituted the instant action in 1980 making a wide variety of claims including antitrust infractions by the shipping companies, breach of the duty of fair representation by the union, breach of fiduciary duties as well as a variety of other ERISA violations by the plan and its trustees, and the infliction of emotional distress on both plaintiffs by the union and plan trustees. Both compensatory and punitive damages were sought. Early on in the litigation all claims against the trustees in their individual capacities were dismissed, and the litigation proceeded against the trustees in their official capacities only.

Many of the claims were dismissed when the court granted partial summary judgment for defendants in an opinion reported at 571 F. Supp. 1430 (1983), with which familiarity is assumed. At trial a jury was empanelled to consider the claims for breach of the duty of fair representation, for emotional distress, and for compensatory and punitive damages against the union and the trustees. At the close of the plaintiffs' case those claims were taken from the jury and dismissed by the court, applying the standard enunciated in *Simblest v. Maynard*, 427 F.2d 1, 4 (2d Cir. 1970) and cognate cases, see e.g. *Mattivi v. South African Marine Corp., "Huguenot"*, 618 F.2d 163, 167 (2d Cir. 1980).

This resulted in the dismissal of all claims against the union and all claims concerning Mrs. Chambless, leaving Chambless as the sole plaintiff in the case. What remained to be decided was whether the forfeiture of Chambless' pension benefits until age 65 by the plan trustees was arbitrary and capricious. Since that matter was an issue for court determination, the jury was dismissed and the trial proceeded to the court. Subsequent to the conclusion of the trial, the parties submitted post-trial proposed findings of fact and memoranda of law.

Determination

Chambless claims that the suspension of his pension until age 65 violates Section 203 of ERISA, 29 U.S.C. § 1053(a). Prior to December, 1975, a plan participant was entitled to what was described as a normal pension after 20 years of pension service credits. Age was not a factor. The regulations were changed in December, 1975 to conform to ERISA language, 29 U.S.C. § 1053(a), prohibit all vested pension benefits from forfeiture at normal retirement age. The statute defines normal retirement age as 65 years of age, or if later, the 10th anniversary of a participant's participation in the plan. Amendment 42 to the plan regulations tracks this statutory language. It is clear that ERISA imposes no obligation to pay retirement benefits to a plan participant before he reaches age 65. *Fine v. Semet*, 699 F.2d 1091, 1093 (11th Cir. 1983). *Riley v. MEBA Pension Trust (Riley II)*, 452 F. Supp. 117, 120 (S.D.N.Y.) (MacMahon, J.), *aff'd* 586 F.2d 968, 970 (2d Cir. 1978; *Hurn v. Retirement Fund Trust*, 648 F.2d 1252, 1253-54 (9th Cir. 1981). See also *Morse v. Stanley*, 732 F.2d 1139, 1144 (2d Cir. 1984) ("Considering that . . . the plaintiffs . . . will each receive their vested benefits with interest upon reaching their normal retirement

age (65), their contention that the trustees acted arbitrarily or in bad faith in denying them accelerated benefits is without merit"). Moreover, where the trustees act within the law their determinations may be disturbed by court order only on a showing of bad faith, caprice or arbitrariness. *Riley v. MEBA Pension Trust (Riley I)*, 570 F.2d 406, 410 (2d Cir. 1977); *Fine v. Semet, supra*; *Bayles v. Central States, Southeast and Southwest Areas Pension Fund*, 602 F.2d 97 (5th Cir. 1979).

The trustees are required to provide plan participants with a summary plan description which sets forth circumstances which may result in disqualification, ineligibility, denial or loss of benefits. 29 U.S.C. 1022a(1), (2)(b). Neither the administrator nor the trustees complied with this requirement before forfeiting Chambless' benefits. The record discloses that Amendment 47 to the regulations, pursuant to which Chambless' application was denied and he was held to have forfeited his right to a pension until age 65, was adopted August, 1976. The amendment was discussed in articles by Lowen and Maher in the October, 1976 issue of the union newspaper. In Maher's column the text of the amendment was set out in full. The matter was again discussed in another article by Maher in the December, 1976 issue of the union newspaper. As I understand it the newspaper is distributed in quantity at various union hiring halls at offshore ports. Chambless says he never saw the articles. There is testimony that about 200 copies of the October issue of the MM&P newspaper would normally be sent to Mobile arriving about the first two weeks of November. The copies are stacked on a table in the hall. A secretary in the Mobile office testified by deposition that Chambless had knowledge of Amendment 47 before filing his application. She states that she discussed the matter thoroughly with him and that she wrote the plan office for information on the amount Chambless was expected to receive in pension benefits when he retired. (Dep. Mary Smith at 118). I do not credit the testimony that Chambless and the secretary discussed Amendment 47 thoroughly. Amendment 47 had no conceivable impact on Smith sufficient to stimulate her interest in the provisions to the point that she would be able to discuss it thoroughly with anybody. In any event, it is the trustees' responsibility to get the necessary information to the participants. Chambless' vicarious receipt of this knowledge through third parties not connected with the plan does not suffice. Moreover, while it is clear from Chambless' response to Maher's inquiry about engaging

in forbidden employment that he knew that he would be barred from receiving any pension until he had actually retired, I am satisfied that he did not understand the impact which Amendment 47 would have on his pension rights.

There is no evidence of any act by the plan or union to clarify that impact for participants. What was published in the various articles was the simple message that forbidden employment would result in forfeiture of the right to retirement benefits until age 65. Neither the articles in the October and December issue of the newspaper nor even the letter sent to all participants dated 13 March 1978 explained the full import of the forfeiture of the right to benefits until age 65 to a participant such as Chambless with 32¼ years of pension service credits. The forfeiture until age 65 brought into play an additional factor not mentioned in any of these statements concerning the amendment. A wage related pension benefit provision accords a participant the right to have his benefits based on the average of his highest salary for five of his last ten years before retirement during which he earned the most. Denying Chambless the right to a pension until age 65 meant not only that his pension was postponed, but since the ten years preceeding the year in which he turns age 65 meant not only that his pension was postponed, but since the ten years preceeding the year in which he turns age 65, 1976-1986, cover a period in which he will earn nothing on MM&P jobs, the wage related formula pursuant to which he would have obtained a generous pension would not apply. His benefits would be determined under a different formula which results in reducing his benefits to roughly half of what he would have received in 1977 based on a wage related formula.

While the court does not believe the trustees willfully withheld information from Chambless or other participants as to the effective reach and full import of Amendment 47, the statutory requirement of full disclosure has no meaning in this context unless the trustees are required to advise participants fully of what effect a new regulation will have before they can penalize a participant for violating the regulation. Defendants contended at trial that Chambless knew, or should have been able to figure out by taking into account the wage related provision, the effect forfeiture until age 65 would have on his pension benefits. It is not all that obvious, however, and it seems to me inequitable to enforce the new provision without first having its full effect explained to all participants. In my judgment, therefore,

the trustees were barred in 1977 from applying Amendment 47 to Chambless before first explaining all of its implications to him. It is clear enough that Chambless believed he might be denied his pension for the period he continued to work. He was not aware, however, that by taking a non-MM&P assignment he had forfeited his rights to a pension until age 65 and moreover that the forfeiture carried an added penalty of halving the benefits he had been advised he would receive.

Amendment 47 is arbitrary and capricious in any event. In *Riley v. MEBA Trust Fund (Riley I)*, *supra* at 413, the Second Circuit stated that "new federal standards of fairness must apply with respect to charges of breach of fiduciary duty not explicitly covered by Part 4 of ERISA", but concluded that it knew of no applicable federal standard other than the arbitrary or capricious yardstick. Suspension of benefits until age 65 is, of course, permissible. *Sutton v. Weirton Steel Division of National Steel Corp.*, 724 F.2d 406, 410 (4th Cir. 1983), *cert. denied*, ____ U.S. ____ 104 S.Ct. 2387 (1984); *Hurn v. Retirement Fund Trust of the Plumbing, Heating and Piping Industry of Southern California*, 460 F. Supp. 112 (C.D.Ca. 1978), *aff'd*, 648 F.2d 1252 (9th Cir. 1981). However, the right to suspend benefits until age 65 is of no comfort to defendants. They have not only suspended Chambless' rights to benefits until age 65 but have confiscated a considerable part of those benefits. While the cases allow suspension, none has approved a formula where the suspension results in greatly reduced benefits. Indeed, in *Morse v. Stanley*, *supra*, the court was satisfied that all of plaintiffs' accrued benefits would be received, with interest, when they reached age 65 and explicitly cited this factor in setting forth its reasons for allowing the funds to be withheld.

Defendants argue that since the wage related benefits were incorporated into the pension plan pursuant to a collective bargaining agreement, the trustees' enforcement was required unless modification was necessary to comply with applicable federal standards and that the arbitrary and capricious standard is not applicable. *See United Mine Workers of America Health & Retirement Fund v. Robinson*, 455 U.S. 562 (1982). That contention, however, misses the point. The wage related provision is not being contested. What is questioned is the trustees' right to forfeit a plan participant's vested rights by taking action which results both in suspending his benefits until age 65 and in reducing much of the accrued and vested pension benefits.

The discrimination that the plan practices against retirees and applicants for retirement, barring participation in any maritime employment while allowing others to continue working in the maritime industries and permitting [sic] some retirees, pursuant to the 1981 collective bargaining agreement, to accept, after three years, employment on vessels engaged in offshore drilling, exploration and research, or on vessels ancillary to such operations, and permitting short time employment on vessels engaged in trial runs or being delivered, provided union approval is received and plan trustees are notified, does not seem in the abstract so egregious as to come within the arbitrary or capricious prohibition. Nonetheless, the bar became arbitrary and capricious in its application to Chambless.

In 1976, the union launched a plan to pressure older licensed deck officers to retire. Chambless, who between 1966 and 1975 had regularly received assignments as chief mate or master, was told either to retire or to accept only the lowest grade assignment — second or third mate. Indeed, his only assignments from MM&P hiring halls during 1976 and 1979 were second and third mate jobs. Subsequent to the events in this case, the union sought, through collective bargaining agreement, to secure for older licensed deck officers pension benefits that were not wage related. This would have enabled the union to continue its policy of giving choice assignments to younger men without unduly penalizing the older officers. As of 1979 the union had not succeeded in exacting those benefits from the employer.

The union cannot adopt a policy of forcing applicants to retire or face low paying assignments if they refuse to do so and yet prohibit or penalize them from working apart from MM&P in jobs matching the skills and experience they have acquired. This is another reason why the penalty imposed on Chambless for accepting employment as a master on ships operated by companies not under contract to MM&P is capricious.

A retiree who works in forbidden employment but not as a licensed deck officer on a U.S. flag ocean going vessel operated by a company not under contract to MM&P forfeits his pension for the time he is working and for six months thereafter. One, however, who works as a licensed deck officer on a U.S. vessel under the jurisdiction of a rival union forfeits his pension until age 65. This regulation does not conform to ERISA requirements. It is evident that no forfeiture of

benefits can be exacted for competing with an employer. *Hummel v. S.E. Rykoff & Co.*, 634 F.2d 446 (9th Cir. 1980); *Westwood Chemical Co., Inc. v. Kulick*, 570 F. Supp. 1032, 1034 (S.D.N.Y. 1983) (Werker, J.); *Bonar v. Barnett Bank of Jacksonville*, 488 F. Supp. 365 (M.D. Fla. 1980). Trustees have a fiduciary obligation to act with care, skill, prudence and diligence, 29 U.S.C. §1104 (a)(1)(B), and they must administer the plan solely in the interest of the participants and their beneficiaries. The trustees' basic fiduciary obligation is to maintain the pension fund on a sound economic and actuarial basis. They must not favor one group of participants over others, but where action is taken to preserve or maintain the integrity of the fund which incidentally disadvantages one group of participants, no fiduciary breach of trust has occurred.

In this instance there was testimony by one of the employer designated trustees that he favored Amendment 46's and Amendment 47's forfeiture of benefits for participants who worked for parties not contributing to the MM&P plan, because the plan was very costly and employers wanted participants to work as long as possible so that the employers could get their money's worth.¹ That testimony makes clear that the employer trustees and the union trustees approved the Amendments for different and conflicting reasons.

Employer trustees favored the regulations as a means of keeping participants working on their vessels for a long time. They did not like the idea of bearing the burden of financing a pension plan where employees with 20 years of pension service credit could retire, receive pension benefits, and then go to work for a competing employer in the industry. The union wanted to keep younger licensed deck officers content with their MM&P affiliation. Therefore they pressured the older officers to retire with these provisions. Given the wage related formula for computing pension benefits, the threat to assign older officers lower paying second and third mate jobs was tantamount to a threat to reduce their pensions. Thus they had to choose between retiring and securing a greater pension benefit or continuing to work faced with both a loss of pay and status and also a reduced pension. Amendment 47 was intended to prevent older officers from escaping this Hobson's choice by taking non-MM&P jobs.

Defendants, to the court's surprise, presented no expert actuarial testimony that the penalty imposed in the two amendments was needed

or even that it in any way enhanced the financial integrity of the plan. There was no evidence that actuarial considerations were a factor in the trustees' decision to adopt these amendments. Finally, it is impossible to conclude that the financial integrity of the plan is protected by severely penalizing defectors from MM&P ranks, when the impact on the plan's financial well being of those retirees who work in forbidden employment other than on U.S. flag ocean going vessels not covered by MM&P agreement is so insignificant that a denial of benefits while they work and for six months thereafter suffices. There was, moreover, no testimony that the plan's actuaries had advised imposing the penalty or had approved it as needed to safeguard the plan. On the contrary, the amendments were of union origin, drafted by union counsel, and there is nothing in the record to show that the amendments benefited the plan or its participants.

I conclude, as did the court in *Deak v. Masters, Mates and Pilots Pension Program*, No. 79-190 slip. op. at 15 (M.D. Fla. June 4, 1984), "Trustees drew a distinction between certain types of re-employment in the industry primarily to protect MM&P by discouraging members who were eligible for their pension from accepting any job which benefited a competing union."

This penalty imposed on Chambless pursuant to Amendment 47 has not been justified, and is at best the product of the trustees' uninformed analysis. *Elser v. IAM National Pension Fund*, 684 F.2d 648 (9th Cir. 1982), cert. denied, ____ U.S. ____, 104 S.Ct. 67 (1983); *Winpisinger v. Aurora Corp.*, 456 F. Supp. 559 (N.D. Ohio 1978).

While the trustees may clearly impose regulations requiring full retirement before they are obligated to award pension benefits, they cannot extract the harsh penalty they imposed on Chambless in this case. The regulation pursuant to which the penalty was imposed is not in the interest of the plan participants or their beneficiaries and is not necessary to maintain the financial integrity of the fund. Accordingly, the action of the trustees was arbitrary and capricious. Moreover, while Chambless could be denied pension benefits while he was still going to sea, he was not adequately informed of the harsh penalty that would be inflicted by his working for a rival union. His inquiry in his undated response to Maher's letter of July 19, 1977 makes clear that he thought he would be denied a pension only during the period he worked.

The action forfeiting his pension until age 65 is declared a nullity. The trustees are ordered to approve Chambless' application for a pension provided he ceases working in the maritime industry and certifies that he has done so and applies for a pension within six months of the date of this decision. If he so applies the trustees are to treat the application as if it had been made in 1977 and grant him a wage related pension based on his 1967-1977 employment record.

IT IS SO ORDERED.

Dated: New York, New York
August 2, 1984

/s/ Robert L. Carter
ROBERT L. CARTER
U.S.D.J.

1 Captain Lowen, Union President, on being deposed by plaintiff's counsel before trial, stated that he did not recollect the August 24, 1976 meeting of the trustees - the date Amendments 46 and 47 were adopted. (Lowen Dep. PP 194). He did not recall Bernard Epstein's review of the definition of retirement with the Joint Committee of Trustees at the August, 1976 meeting and did not recall what amendments Epstein had prepared. He did recall Amendments 46 and 47 from just having seen them. *Id.* 196-197. He did not recall having discussed the Amendments with Epstein before the meeting and had only a vague recollection of the meeting when the Amendments were discussed. *Id.* 198.

Nonetheless, at trial on questioning by counsel for the plan Lowen launched into a long and extensive dissertation on the reasoning behind the amendments and the need to protect the integrity of the fund. It is clear that at the pretrial deposition Lowen deliberately frustrated plaintiff's right to discovery. Accordingly, his testimony concerning the basis for these amendments is stricken and will not be considered by the court. F.R.Civ.P. 37.

United States Court of Appeals
FOR THE SECOND CIRCUIT

CHAMBLESS,

Plaintiffs-Appellants, Cross-Appellees

— against —

MASTERS,

Defendants-Appellees, Cross-Appellants.

88-7892, 88-7928

Docket Number

NOTICE OF MOTION

state type of motion

for Attorneys' Fees and Litigation Expenses on Appeal

MOTION BY: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

Arthur M. Wisehart
WISEHART & KOCH
25 West 43d Street, Suite 1114
New York, New York 10036
(212) 730-0044

Has consent of opposing counsel:

A. been sought?

☐ Yes

☒ No

B. been obtained?

☐ Yes

☒ No

Has service been effected?

☒ Yes

☐ No

Is oral argument desired?

☐ Yes

☒ No

(Substantive motions only)

Requested return date:

(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order? n/a ☐ Yes ☐ No

B. by firm date of argument
notice? n/a ☐ Yes ☐ No

C. If Yes, enter date: not applicable

Judge or agency whose order is being appealed:

Hon. Robert L. Carter, U.S.D.J.

OPPOSING COUNSEL: (Name, address and tel. no. of law firm and of attorney in charge of case)

Bettina B. Plevan
PROSKAUER ROSE GOETZ & MENDELSON
300 Park Avenue
New York, New York 10022
(212) 909-7000

**EMERGENCY MOTIONS, MOTIONS FOR STAYS &
INJUNCTIONS PENDING APPEAL**

Has request for relief been made
below? ☐ Yes ☐ No

(See F.R.A.P. Rule 8)

Would expedited appeal eliminate
record need for this motion? ☐ Yes ☐ No

If No, explain why not:

Will the parties agree to maintain
the status quo until the motion
is heard? ☐ Yes ☐ No

Brief statement of the relief requested. Appellants request an award of attorneys' fees because they prevailed in part on the appeal. Alternatively, they request an order directing the district court to include an award of attorneys' fees and litigation expenses incurred on this appeal as part of the issues remanded to the district court.

By:
(Signature of attorney)

Appearing for:
(Name of party)

Appellant or Petitioner:
☒ Plaintiff ☐ Defendant

Appellee or Respondent
☐ Plaintiff ☐ Defendant

/s/ Arthur M. Wisehart

Arthur and
Mildred Chambless

Arthur M. Wisehart

February 12, 1990

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is denied.

/s/ Amalya L. Kearse

/s/ Richard J. Cardamone

/s/ Lawrence W. Pierce

MAR 14 1990

United States Court of Appeals
FOR THE SECOND CIRCUIT

CHAMBLESS,

Appellants,

— against —

MASTERS,

Appellees.

86-7789

Docket Number

NOTICE OF MOTION

state type of motion

for Attorneys' Fees, Costs, and Expenses

MOTION BY: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

Arthur M. Wisehart
WISEHART & KOCH
25 West 43d Street, Suite 1114
New York, New York 10036
(212) 730-0044

Has consent of opposing counsel:

A. been sought?

☐ Yes

☒ No

B. been obtained?

☐ Yes

☒ No

Has service been effected?

☒ Yes

☐ No

Is oral argument desired?

☐ Yes

☒ No

(Substantive motions only)

Requested return date:

(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

- A. by scheduling order? ☒ Yes ☐ No
- B. by firm date of argument notice? ☒ Yes ☐ No

C. If Yes, enter date: January 5, 1987

Judge or agency whose order is being appealed:

Hon. Robert L. Carter, U.S.D.J.

OPPOSING COUNSEL: (Name, address and tel. no. of law firm and of attorney in charge of case)

Bettina B. Plevan
 PROSKAUER ROSE GOETZ & MENDELSON
 300 Park Avenue
 New York, New York 10022
 (212) 909-7000

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☐ Yes ☐ No
 (See F.R.A.P. Rule 8)

Would expedited appeal eliminate record need for this motion? ☐ Yes ☐ No

If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☐ No

Brief statement of the relief requested. Appellants request an award of attorneys' fees, costs and expenses incurred in connection with the appeal. Appellees' motion to dismiss the appeal, and the instant motion.

By:
(Signature of attorney)

Appearing for:
(Name of party)

Appellant or Petitioner:
☒ Plaintiff ☐ Defendant
Appellee or Respondent
☐ Plaintiff ☐ Defendant

/s/ Arthur M. Wisehart

Arthur and
Mildred Chambless

Arthur M. Wisehart

4/24/87

ORDER

IT IS HEREBY ORDERED that the motion is disposed of as follows:

Chambless is awarded ordinary costs for the appeal in an amount to be determined by the district court. Chambless' request for attorney's fees for the appeal is remanded to the district court for a determination whether such an award is warranted and, if so, in what amount.

/s/ Wilfred Feinberg

WILFRED FEINBERG, Chief Judge

/s/ Ellsworth A. Van Graafeiland

ELLSWORTH A. VAN GRAAFEILAND

/s/ Lawrence W. Pierce

LAWRENCE W. PIERCE

5/20/87

Date

AFFIDAVIT OF JOHN W. WHITTLESEY, DATED
NOVEMBER 13, 1987

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

_____	x
	:
ARTHUR CHAMBLESS and	:
MILDRED H. CHAMBLESS,	: 80 Civ. 4258 (RLC)
	:
Plaintiffs,	:
	:
against —	: AFFIDAVIT OF
	: JOHN W. WHITTLESEY
	:
MASTERS, MATES & PILOTS	:
PENSION PLAN, et al.,	:
	:
Defendants.	:
_____	x

STATE OF NEW YORK)	
)	ss.:
COUNTY OF NEW YORK)	

JOHN W. WHITTLESEY, being duly sworn, deposes and says:

1. My name is John W. Whittlesey. I am of counsel to the law firm of Wisheart & Koch, attorneys for the plaintiffs in this matter.

2. I make this affidavit to correct certain distortions and misconceptions that taint the answering papers of defendants herein opposing plaintiffs' application for attorney's fees in this matter.

3. I am fully familiar with the issues in this case, not only because I have participated from time to time in its progress since joining Wisheart & Koch in 1984, but also because of my background in labor and employee relations and benefits law.

4. I was Chief Labor Counsel for Union Carbide Corporation from 1971 to my retirement in 1982, and Senior Labor Attorney for that corporation from 1952 to 1971. My responsibilities included all aspects of labor and employee relations law, employment discrimination law, and occupational safety and health law. Employee benefits matters were included among those areas.

5. In addition, I have engaged in labor arbitration, fact-finding and mediation since 1971 and continue to engage in such activities. I have also practiced law since 1982, concentrating on my specialties listed in paragraph 4 above. I am a member of various Bar Associations including the Association of the Bar of the City of New York; the American Arbitration Association; New York State's PERB panel; and continue as chairman of the OSH Committee of the Business Council of New York, as well as a member of the Council's Labor Relations and Workers' Compensation Committees.

6. I can, in light of the above background, understand the motivation behind the defendants' memorandum of law in opposition to plaintiffs' fee application. It obviously seeks to cut defendants' costs in a matter in which defendants were found guilty of arbitrarily and capriciously reducing the pension rights of the plaintiffs herein. I have reviewed many such efforts as an attorney in the past, and am fully familiar with them. Placed in perspective, however, such attempts are successful only if they relate to facts and reality, which defendants' position clearly does not.

7. The memorandum's thrust (section I) in part is to try to reduce defendants' responsibility for plaintiffs' attorney's fees in two ways: (1) by misrepresenting what plaintiffs have applied for and supported, and (2) by falsely stating that such of plaintiffs' claims as were denied by the court were unrelated to the successful ERISA claim. Therefore, defendants aver, all activity in handling such alleged unrelated claims must not be compensated because they were turned down. Indeed, defendant goes so far as to claim that, for what they say is a statement

of 4045 "mixed" hours, plaintiffs should recover no fees at all, even though defendants admit that at least some of those hours were spent on the successful ERISA claim. Such a position can only be characterized as absurd in light of those portions of the opinion in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), conveniently omitted from defendants' memorandum.

8. Defendants rely throughout their memorandum on a grossly distorted view of the U.S. Supreme Court decision in *Hensley*, which they state, is "binding on this Court." What binds this Court, however, is the entire decision, not merely those portions quoted out of context by defendants.

9. Defendants' position, as stated, would deprive plaintiffs of any fees for "mixed" hours, even though the affidavits of Paula C. Rowe and Russell G. Pelton plainly state that the hours charged were apportioned as clearly as possible and that fees for such mixed hours were claimed because they were, contrary to defendant's allegations, devoted to the successful ERISA claims and closely-related issues, a showing that defendants do not in fact contest.

10. This approach is consistent with the *Hensley* ruling, as well as the decision of the Second Circuit in remanding this matter. 813 F.2d 869 (1987).

11. In *Hensley*, the Court stated in a section which defendant evidently ignored, that (461 U.S. at 427):

"where a plaintiff has achieved excellent results, his attorney should receive a fully compensatory fee. Normally *this will encompass all hours reasonably spent on the litigation* and, indeed, in some cases of exceptional success an enhanced award may be justified. In these circumstances, the fee award *should not be* reduced simply because plaintiff failed to prevail on every contention raised in the lawsuit. [Citation omitted.] Litigants in good faith may raise alternative legal grounds for a desired outcome and the court's rejection or failure to reach certain grounds is not a

sufficient reason for reducing a fee. *The result is what counts.*" (Emphasis added.)

12. The Second Circuit in this matter has clearly endorsed this approach where it said (*Chambless v. Masters, Mates & Pilots Pension Plan*, 815 F.2d 869, 872):

"ERISA's attorney's fee provisions must be liberally construed to protect the statutory purpose of vindicating retirement rights even when small amounts are involved. See *Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587, 589-90 (9th Cir. 1984)."

It also stated that:

"Those [prior Second Circuit] opinions looked not to plaintiff's motives in bringing suit, but to the effect of plaintiff's victory. *It is the latter which is controlling.*" (815 F.2d at 872; emphasis added.)

13. The Chambless action was, as the complaint makes perfectly clear in the demand for relief, one to ensure that "plaintiff Arthur Chambless receive judgment requiring the payment of \$920 per month beginning as of May 1, 1977 with interest thereon until the date of judgment . . ." Other demands were for payment for failure to provide information; rectification of defendants' violation of the antitrust laws; and for punitive or exemplary damages.

14. The major thrust of the lawsuit, thus, was the recovery of plaintiff's pension of which he was unlawfully deprived by defendants. Absent such objective, this lawsuit would never have been brought, and this objective has been achieved.

15. The basis upon which this Court upheld plaintiff's right to such a pension was the fact of defendants' violation of ERISA by their adoption and application of the Pension Plan's Amendment 47, and the bad faith of the Pension Plan defendants. (602 F. Supp. at 911-13.)

16. Other alternative grounds and remedies cited in the complaint as to why this result was desirable involved violations of the antitrust laws (Cause of Action 2); waiver and estoppel (Cause of Action 3); breach of duty of fair representation (Cause of Action 4); and breach of contract (Cause of Action 5); not to mention breach of fiduciary duty in adopting age 65 as a normal retirement age (Cause of Action 1).

17. That these alternative grounds for enhancing plaintiff's pension were rejected does not alter the fact that the result achieved was precisely what Captain and Mrs. Chambless were looking for in the lawsuit. There is no dispute that all of these grounds were aimed at arriving at such a result, and were thus related intimately and inextricably, certainly, as to objective. (Although plaintiffs believe that all of the claims are related, the fee application only seeks fees and expenses included in connection with the ERISA and related pension matters.) It would have been impossible to support each such ground alleged as set forth in paragraph 16 without reference to the others and without coordinating the thrust of each allegation. As the Supreme Court said in *Hensley, supra*, therefore, "the fee should not be reduced because plaintiff failed to prevail on every contention raised. . . . What is the most critical factor is the degree of success obtained."

18. This Court has already stated as an uncontested finding of fact that it found plausible plaintiffs' claim that their attorneys spent "over 9000 hours and almost \$1,000,000 in lawyers' time on their clients' behalf." (As quoted in the Second Circuit's opinion at 815 F.2d at 872.) (Indeed, defendants' stated attorneys' fees and expenses in this matter are almost \$800,000 as of January 31, 1987 and presumably have been increased since then according to the record in another case in this Court, *Sokolowski v. Aetna Life & Casualty Ins. Co.*, 84 Civ. 4801 (RWS), slip op. (S.D.N.Y. Oct. 9, 1987).) This Court further stated that it would have awarded attorneys' fees had the case been brought solely to vindicate Chambless' claim to appropriate pension benefits, "since I am satisfied that he was treated badly to serve the political purposes" of the Plan, and that the action of the Pension Plan defendants constituted a "harsh penalty" that

they intended to be used to force older beneficiaries "to retire or face low-paying assignments if they refuse to do so, and yet prohibit them from working apart from MM&P in jobs matching their skills and experience they have acquired. (602 F. Supp. at 911, 913.)

19. Where the Second Circuit has ruled that "Chambless' other claims do not affect this entitlement" (815 F.2d at 872), the picture is clear that it expects plaintiffs to be awarded reasonable fees and expenses for the effort entailed in pursuing this litigation.

20. I have reviewed the various documents submitted in this matter including the time sheets and calculations Mr. Pelton and Ms. Rowe attached to their affidavits. I am satisfied that the fees and expenses requested are correct, that the mixed hours included by Mr. Pelton relate to time spent on the successful claim and closely related matters, that hours spent on matters not closely related to the claim which was upheld have been excluded from the computations, and that the computations submitted are correct.

21. Other errors of fact and law appear in defendants' memorandum. On page 24 thereof, one of the items said to be excludable is the time spent in connection with the fee application. Yet the time spent in connection with the fee application. Yet the applicable rule in the federal courts is that such fee charges are perfectly appropriate in an application of this sort. See *Trichilo v. Secretary*, No. 87-6023, *sli op.* (2d Cir. Nov. 4, 1987), noted in *New York Law Journal*, November 12, 1987, p. 1, c. 3. Indeed, on the other matters cited on page 24, no reason for excluding any such time for the fee application is given. Accordingly, plaintiffs' claim in this area must stand undisputed.

22. On page 25, I am accused, with others, of having "spent a great deal of time in familiarizing" myself with the facts and the law." I did not, in fact, charge for such familiarization time, a point as to which Ms. Plevan in any case could not possibly have had any knowledge. Her statement is an assumption only, as are a number of other statements in the memo and are, as

such, entitled to be considered only lightly, if at all. Moreover, to the extent that defendant's statement seeks to foreclose and forbid any attorney charging fees for research on legal points, it is patently absurd. No one has instant, finger-tip knowledge of every legal point necessary to make in a particular matter as Ms. Plevan's experience with the law should have taught her many years ago.

23. The comments on the hourly rates charged for attorney's work on behalf of plaintiff in defendants' memorandum come with particular ill grace. Defendants' law firm charges an hourly rate ranging from \$90 to \$350 depending on the status of the attorney. In particular, all work I have done for Wisheart & Koch has been billed regardless of client at a rate of \$150 per hour. All of it has been legal in nature, and all of it has been performed in the years 1985, 1986 and 1987. Ms. Plevan's arbitrary and unsupported assumption that all of my counsel work should be billed at rates lower than an associate at her own law firm is, to put it mildly, wholly without support or warrant. In that connection, the text of the article in *Manhattan Lawyer*, 5/11/87 (Exhibit C to the Fee Application) shows that even associates at various New York law firms are paid at rates ranging from \$115 to \$200 per hour. The article also states: "Almost every firm surveyed reported that they often" bill clients at "premiums over the standard rates." It also quotes another law firm as saying: "We always pay the going rate even if we're not a large firm." The survey thus reported is authoritative, and indeed contested by defendants only by *inneundo* and not otherwise.

24. In that connection, defendants appear to refuse to accept as authoritative the fees listed in the *Manhattan Lawyer* article. However, they must be aware of the fact that such fees are modest, based on the contents of an affidavit by Edgar Pauk, attorney for plaintiffs in *Miele v. New York State Teamsters Conference Pension and Retirement Fund*, No. CV 81-0084 (E.D.N.Y.), dated February 11, 1986, of which certain attachments are affixed to that affidavit and quoted in full (pp. JA-156 to JA-167). (Exhibit A annexed hereto.) The fees cited therein plainly show plaintiffs' requests to be modest in comparison with those charged.

25. Defendants seek to reduce plaintiffs' claimed lodestar amount on the basis of a quote from *Hensley* which says absolutely nothing whatsoever about a lodestar rate. (Defendants' Memorandum p. 10-11.) Indeed, nowhere in the *Hensley* opinion is the word lodestar mentioned; reasonable fees, of course, which is what *Hensley* requires, is precisely what ERISA section 502 permits and which plaintiff seeks.

26. Defendants' position relies on unsupported allegations; selective quotations from various court decisions, including *Chambless*; unverified assumptions; and just plain misrepresentation in order to strike down plaintiffs' fee application.

27. Similar tactics destroy the validity of defendants' claim for attorneys' fees for work performed on the summary judgment motion. The claim is that because certain of plaintiffs' claims were allegedly frivolous, an award of attorneys' fees for defending against them is available.

28. Nowhere, however, do defendants support that contention. The mere fact that certain of the claims were dismissed on summary judgment does not establish that they were frivolous or ill-founded. All the claims stated were made in good faith, based on factual and legal theory that could well have been sustained. Plaintiffs do not intend to reargue the case; it is sufficient to note that what is stated in the memorandum in support of defendants' counterclaim for an offset is woefully short of establishing the frivolousness of plaintiffs' unsuccessful claims, and indeed demonstrates the frivolousness of defendants' counterclaim.

29. The so-called counterclaim of defendants is nothing more than a transparent effort of reduce plaintiffs' attorneys' fee request, and should be awarded no more credence than is here given it, to wit, none. The finding of the courts with regard to fee applications are instructive, especially where the Second Circuit states in the *Chambless* matter (815 F.2d at 872):

"Defendants, however, have not been blameless in this case. The five part test takes into account the

relative merits of the parties' positions and also requires findings about bad faith. With respect to the ERISA claim on which plaintiff prevailed, the district court resolved *both of these factors in his favor.*" (Emphasis added.)

30. The Second Circuit went on to state that the denial of fees by the district court "completely improperly shifts the issue from whether Chambless is entitled to attorneys fees to whether he should be penalized for his litigation strategy." (*Id.*) The Court further said that failure to recover fees for "vexatious and wasteful claims" is in itself a penalty that would not affect plaintiffs' right to reasonable attorneys' fees for his successful claim, a pronouncement defendants avoid confronting in their memorandum in their zeal to deprive plaintiff of his just deserts.

31. During the entire period relevant hereto, defendants took the position that Amendment 47 (and others) were added as alterations to Plan provisions because of financial reasons. Yet defendants knew, and this Court found, that there were no actuarial studies whatsoever supporting that position, and knew that contemporaneous evidence available showed that financial considerations played no part in the Plan deliberations leading to this and other amendments. The Court found that (603 F. Supp. 913):

"Defendants, to the court's surprise, presented no expert actuarial testimony that the penalty imposed in the two amendments was needed or even that it enhanced in any way the financial integrity of the plan. There was no evidence that actuarial considerations were a factor in the trustee's decision to adopt these amendments."

32. The Court also found that Union President Lowen attempted to state that the adoption of the amendments was to "protect the integrity of the fund," a contention the Court flatly rejected. Indeed, the Court adds, Lowen "frustrated the plaintiffs' right to discovery" at his deposition.

33. It is thus clear that the defendants herein bear a heavy, indeed virtually the sole, responsibility for the length and contentiousness of this litigation. They at no time offered any sort of settlement. They proceeded on a theory that any "concession" to plaintiffs would harm the Plan's financial integrity, even though they knew throughout the litigation that there was no basis for that contention whatsoever, and in the full knowledge that that Plan was proceeding to implement Amendments 46 and 47 solely for political purposes, as the Court ultimately found, which were without benefit to the Plan. As the Court found in its opinion dated June 23, 1986, "Defendants are surely guilty of bad faith The amendment was not proposed to protect the corpus of the pension fund or to further the interests of the Plan participants. *The principal purpose was to further union politics.* Thus, there is culpability on the part of Plan trustees." (Slip op. pp. 5-6; emphasis added.)

34. To complain about plaintiffs' fee request in the light of that undisputed record is beyond question hypocritical in the extreme. The failure of defendants ever to explore settlement possibilities is further evidence both of their bad faith in adopting the amendment that caused this litigation in the first place, and of the frivolous and false position that they took throughout the case in representing to the Court that the financial integrity of the Plan was the basis of their position rather than a blatant case of union politics.

35. Finally, it should be noted that defendants' attorneys' fees and expenses in this matter had already amounted to some \$750,000 by January 31, 1987. These fees were incurred by the Pension Plan defendants, who pushed plaintiffs into litigation in this matter by taking and maintaining a position they (and their attorneys) knew was utterly indefensible. The hypocritical nature of defendants' contention that plaintiffs unnecessarily prolonged this case and discovery proceedings is apparent from a brief review of their defense to the arbitrary and capricious Amendment 47.

36. Judge Sweet of the Southern District of New York recently found in *Sokolowski v. Aetna Life & Casualty Ins. Co.*, 84

Civ. 4801 (RWS), that the defendant Pension Plan's insurance company was obligated, despite its earlier denials of coverage, to defend the Plan in this lawsuit and in particular "to indemnify the Plan for any attorneys fees that may ultimately be awarded in the *Deak* and *Chambless* cases." (Slip op. dated October 9, 1987). The stonewalling that has, to date, plainly been a factor in the Plan's resistance to plaintiffs' claims, and in particular to the payment of just attorneys' fees, because of the pendency of such collateral litigation thus appears to have now been exposed; defendants, in the light of Judge Sweet's decision, no longer need hypocritically claim that plaintiffs' recovery, costs and fees will come directly out of Plan finances, but will properly have been assumed by its insurer, Aetna.

37. In summary, plaintiffs' request for fees and expenses is reasonable, has been so found by the courts, and plaintiffs' showing thereon has not been refuted in any way by defendants' memorandum and counterclaims.

Respectfully submitted,

/s/ John W. Whittlesey

John W. Whittlesey

Sworn to before me this
13th day of November 1987:

Notary Public

STEVEN LIM

Notary Public, State of New York

No. 4836097

Qualified in Nassau County

Commission Expires August 31, 1988

EXHIBIT A, ANNEXED TO WHITTLESEY AFFIDAVIT

Excerpts from Joint Appendix in *Miele v. New York State Teamsters Conference Pension & Retirement Fund*, No. Cv 81-0084, pp. JA-156-67 (E.D.N.Y.), dated February 11, 1986 surveying attorney fee lodestar rates.

MID-1982 BILLING RATES PER HOUR*

<u>Firm</u>	<u>High Partner</u>	<u>Low Assoc.</u>
Breed, Abbott & Morgan	\$ 200	\$ 70
Brown, Wood, Ivey Mitchell & Petty	240	82
Cadwalader, Wickersham & Taft	220	67
Cahill, Gordon & Reindel	250	70
Chadbourne, Parke Whiteside & Wolff	240	70
Cleary, Gottlieb, Steen & Hamilton	240	60
Coudert Brothers	225	75
Cravath, Swaine & Moore	200	70
Curtis, Mallet-Prevost, Colt & Mosle	200	80
Davis, Polk & Wardwell	275	69
Debevoise & Plimpton	239	78
Dewey, Ballantine, Bushby, Palmer & Wood	220	65

* Source: *The American Lawyer Guide to Leading Law Firms* 1983-94.

<u>Firm</u>	<u>High Partner</u>	<u>Low Assoc.</u>
Donovan, Leisure Newton & Irvine	\$ 205	\$ 60
Finley, Kimble, Wagner, Heine, Underberg & Casey	250	70
Fried, Frank, Harris, Shriver & Jacobson	350	65
Haight, Gardner, Poor & Havens	200	70
Hughes, Hubbard & Reed	210	78
Kaye, Scholer, Fierman, Hays & Handler	220	75
Kelley, Drye & Warren	210	60
Kramer, Levin, Nessen, Kamin & Frankel	275	75
LeBoeuf, Lamb, Leiby & MacRae	250	75
Lord, Day & Lord	275	60
Milbank, Tweed, Hadley & McCloy	250	80
Mudge, Rose, Guthrie Alexander & Ferdon	215	70
Parker, Chapin Flattau & Klimpl	220	76
Patterson, Belknap, Webb & Tyler	225	65
Paul, Weiss, Rifkind, Wharton & Garrison	300	80
Phillips, Nizer, Benjamin, Krim & Ballon	350	75

<u>Firm</u>	<u>High Partner</u>	<u>Low Assoc.</u>
Proskauer, Rose, Goetz & Mendelsohn	\$ 250	\$ 70
Reavis & McGrath	250	80
Reid & Priest	185	60
Rogers & Wells	300	75
Rosenman, Colin, Freund, Lewis & Cohen	210	70
Shea & Gould	275	65
Shearman & Sterling	225	70
Simpson, Thacher & Bartlett	250	78
Skadden, Arps, Slate, Meagher & Flom	285	65
Stroock & Stroock & Lavan	260	76
Wachtell, Lipton, Rosen & Katz	350	75
Webster & Sheffield	275	80
Weil, Gotshal & Manges	275	75
White & Case	240	65
Whitman & Ransom	200	60
Willkie, Farr & Gallagher	275	80
Winthrop, Stimson, Putnam & Roberts	275	69

MID-1983 BILLING RATES PER HOUR*

<u>Firm</u>	<u>High Partner</u>	<u>Low Partner</u>	<u>High Assoc.</u>	<u>Low Assoc.</u>
Barrett, Smith Schapiro, Simon & Armstrong	\$ 275	\$ 160	\$ 150	\$ 75
Breed, Abbot & Morgan	250	140	140	70
Brown, Wood, Ivey, Mitchell & Petty	215	—	—	82
Burns, Summit, Rovins & Feldesman	250	125	110	75
Cadwalader, Wickersham & Taft	235	160	150	69
Cohn, Glickstein, Lurie, Ostrin, Lubell & Lubell	250	150	125	100
Coudert Brothers	250	—	—	70
Curtis Mallet- Prevost, Colt & Mosle	225	150	128	40

* Source: The National Law Journal Directory of the Legal Profession

MID-1983 BILLING RATES PER HOUR*

<u>Firm</u>	<u>High Partner</u>	<u>Low Partner</u>	<u>High Assoc.</u>	<u>Low Assoc.</u>
Debevoise & Plimpton	\$ 248	—	—	—
Donovan, Leisure Newton & Irvine	215	—	—	60
Finley, Kimble, Wagner, Heine, Underberg & Casey	250	125	140	75
Fried, Frank, Harris, Shriver & Jacobson	350	130	—	65
Herzfeld & Rubin, P.C.	185	120	110	65
Hughes, Hubbard & Reed	225	150	138	78
Jackson, Lewis, Schnitzler & Krupman	190	125	120	60
Kaye, Scholer, Fireman, Hays & Handler	250	160	155	75
Kramer, Levin, Nessen, Kamin & Frankel	290	170	160	75

<u>Firm</u>	<u>High Partner</u>	<u>Low Partner</u>	<u>High Assoc.</u>	<u>Low Assoc.</u>
LeBoeuf, Lamb, Leiby & MacRae	\$ 250	\$ 125	\$ 110	\$ 75
Mudge, Rose, Guthrie Alexander & Ferdon	250	155	135	60
Olwine, Connelly, Chase, O'Donnell & Weyher	225	145	125	70
Parker, Chapin Flattau & Klimpl	240	120	115	80
Patterson, Belknap, Webb & Tyler	250	150	140	70
Phillips, Nizer, Benjamin, Krim & Ballon	350	150	135	80
Reavis & McGrath	250	—	—	65
Reid & Priest	195	150	140	50
Rogers & Wells	300	—	—	75
Rosenman, Colin, Freund, Lewis & Cohen	225	150	140	70

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<u>Firm</u>	<u>High Partner</u>	<u>Low Partner</u>	<u>High Assoc.</u>	<u>Low Assoc.</u>
Schulte, Roth & Zabel	\$ 220	\$ 140	\$ 130	\$ 75
Shea & Gould	275	125	125	65
Skadden, Arps, Slate, Meagher & Flom	285	135	135	75
Stroock & Stroock & Lavan	270	165	167	86
Thacher, Profitt & Wood	240	135	140	60
Wachtell, Lipton, Rosen & Katz	350	—	—	75
Webster & Sheffield	275	165	150	80
Weil, Gotshal & Manges	300	140	125	75
Wender, Murase & White	250	140	130	75
Whitman & Ransom	200	115	105	65
Willkie, Farr & Gallagher	275	180	160	80

O'MELVENY & MYERS
RANGE OF HOURLY GUIDELINE RATES FOR 1983*

General Range of Rates

Associates

From joining firm through second full year	\$ 75 — 105
Third through fifth full year	115 — 130
Sixth year to Partnership	140 — 150

Partners	155 — 250
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Paralegals	40 — 60
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Sample Listing of Bar Membership Years and Hourly Rates

Partners

Charles F. Niemeth	1966	230
Richard G. Parker	1974	175
John H. Roney	1960	250
Ralph J. Shapira	1975	170
Robert J. White	1972	200

Associates

Victoria J. Brademan	1982	110
Lisa H. Fenning	1975	150
Richard S. Kolodny	1981	100
Mark D. Plevin	1981	115
Linda J. Smith	1977	150

Paralegals

Felice Harrison	40
Nancy A. Hack	60

*Source: Schedule of rates filed in *In re Baldwin-United Corp. et al.*
 Consolidated Case No. 1-83-02495, (S.D.Ohio, Bank.).

I . BILLING RATES OF MAJOR NEW YORK LAW FIRMS
February 1984*

<u>Firm</u>	<u>High Part- ner</u>	<u>Low Part- ner</u>	<u>High Asso- ciate</u>	<u>Low Asso- ciate</u>
Cadwalader, Wickersham & Taft	\$ 250	\$ 170	\$ 155	\$ 69
LeBoeuf, Lamb, Leiby & MacRae	\$ 250	\$ 160	\$ 155	\$ 75
Skadden, Arps, Slate, Meagher & Flom	\$ 285	\$ 140	\$ 135	\$ 75
Weil, Gotshal & Manges	\$ 300	n/g	n/g	\$ 78
Wilkie Farr & Gallagher	\$ 275	\$ 200	\$ 175	\$ 75

II. DEBEVOISE & PLIMPTON BILLING INDICES
October 1983 — March 1984

	<u>High Part- ner</u>	<u>Low Part- ner</u>	<u>High Asso- ciate</u>	<u>Low Asso- ciate</u>
Debevoise & Plimpton	\$ 255	\$ 196	\$ 173	\$ 80

*Source: *Of Counsel: The Monthly Legal Practice Report*, Vol. 3, No. 2, February 1984. "Billing Rates from Across the Country," p. 7.

BILLING RATES OF NEW YORK'S LARGEST LAW FIRMS
January 1983

<u>Law Firm</u>	<u>Highest Partner Billing Rate Per Hour</u>
Shearman & Sterling	\$ 225
Skadden, Arps, Slate, Meagher & Flom	\$ 285
Davis, Polk & Wardwell	\$ 275
Simpson, Thacher & Bartlett	\$ 250
Paul, Weiss, Rifkind, Wharton & Garrison	\$ 300
Weil, Gotshal & Manges	\$ 275
Fried, Frank, Harris, Shriver & Jacobson	\$ 350
Cleary, Gottlieb, Steen & Hamilton	\$ 240
Sullivan & Cromwell	No hourly rates used
Dewey, Ballantine, Bushby, Palmer & Wood	\$ 220
Kaye, Scholer, Fierman, Hayes & Handler	\$ 220

Source: The New York Times January 16, 1983.

"A Gentlemanly Profession Enters A Tough New Era."
 Sec. 3 p. 10.

DAVIS, POLK & WARDELL
January - March 1983 ¹

	<u>Hourly Billing Rate</u>
Partners	\$ 225 - 250
Senior Associates	\$ 69 - 170.50
Paralegals	\$ 34 - 50

**HOURLY RATES OF
CAHILL, GORDON & REINDEL**
January 1983 ²

<u>Name</u>	<u>Admitted to Bar</u>	<u>Hourly Billing Rate</u>
Partners		
David R. Hyde	1954	\$ 230
Robert Usadi	1966	220
R. Anthony Zeiger	1961	195
Roger Andrus	1970	195
Thomas R. Jones	1976	170
Associates		
P. Kevin Castel	1976	145
Alan B. Koslow	1981	114
Paralegal		52

¹ Source: Application of Davis, Polk & Wardwell for a second Interim Allowance of Compensation Dated May 16, 1983, ¶ 30, *In re Johns-Manville Corp.*, Case Nos. 82-B-11656 through 82-B-11676 (Bankr. S.D.N.Y.), ¶ 30.

² Source: Application of Cahill, Gordon & Reindel for Interim Allowance of Compensation and Reimbursement of Expenses, Dated July 1, 1983, *In Re Saxon Industries, Inc.*, Case No. 82-B-10697 (Bankr. S.D.N.Y.).

March - December 1983 ¹

<u>Name</u>	<u>Admitted to Bar</u>	<u>Hourly Billing Rate</u>
Partners		
Richard A. Stark	1948	\$ 265
Burt A. Abrams	1959	245
	1962 (D. of Columbia)	
Russell L. Brooks	1963	220
Associates		
Nina Krauthamer	1976	150
Charles E. Dropkin	1978	135
Robert A. Banner	1981	110
Kent A. Davy	Unknown	110
Paralegals		33 - 40

**HOURLY RATES OF
WHITE & CASE**
October - November 1982 ²

<u>Name</u>	<u>Admitted to Bar</u>	<u>Hourly Billing Rate</u>
Partners		
John W. Barnum	1957	\$ 225
John J. McAvoy	1958	210
Paul L. Friedman	1968	180
Associates		
Carolyn B. Lamm	1973 (D. of Columbia)	155
Anne D. Smith	1976 (D. of Columbia)	130
Thomas L. Higginson, Jr.	1977 (D. of Columbia)	130
Richard Wallace, Jr.	1977 (D. of Columbia)	65
Legal Assistants		35

¹ Source: Exhibit B to the Affidavit of Charles E. Dookin In Support of Application for Attorneys' Fees, dated January 27, 1984, *Rubin v. Long Island Lighting Co.*, 83 Civ. 0809 (E.D.N.Y.).

² Source: Fifth Application of White and Case for Interim Compensation and Reimbursement of Expenses *In Re AJV Industries, Inc., etc.*, Case No. 81-00617, etc. (Bankr. D.D.C.), p.4.

PLAINTIFFS' APPLICATION FOR ATTORNEYS' FEES,
COSTS, AND EXPENSES, DATED AUGUST 17, 1987

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARTHUR CHAMBLESS and
MILDRED H. CHAMBELSS,

80 Civ. 4258 (RLC)

Plaintiffs,

— against —

MASTERS, MATES & PILOTS
PENSION PLAN, et al.,

PLAINTIFFS'
APPLICATION
AND ATTORNEYS'
FEES, COSTS,
AND EXPENSES

Defendants.

----- X

Upon the basis of this motion, the law firm of WISEHART & KOCH, counsel for the plaintiffs Arthur and Mildred Chambless, seek a determination for an allowance of fees and costs, to be assessed against the Masters, Mates & Pilots Pension Plan.

1. This application is made pursuant to the decision of the United States Court of Appeals for the Second Circuit dated April 6, 1987, in this litigation. *Chambless v. Masters, Mates & Pilots Pension Plan*, 815 F.2d 869 (2d Cir. 1987). It also is made pursuant to Section 502(g) of the Employee Retirement Income Security Act of 1974 ("ERISA"), which provides (29 U.S.C. § 1132(g)(1)):

(1) In any action under this subchapter . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow reasonable attorney's fee and costs of action to either party.

resources who had been forced to escape from the Hobson's Choice that defendants thrust upon him and to seek other employment because of the overwhelming expenses resulting from the medical problems of his wife. Finally, this Court concluded that the defense put forward on the Pension Plan's behalf lacked merit, and that the punitive action taken by the Pension Plan was in bad faith, illegally discriminatory and "arbitrary and capricious". 602 F. Supp. at 911-13.

47. Another factor worthy of consideration is that at no time was the Pension Plan defendant ever willing to discuss settlement of the Chambless claim on a concrete basis. The complaint in this case was prepared in such a way so that the Pension Plan defendants could have settled the case, it was thought, without creating an adverse precedent, because of the unique circumstances. However, it quickly became apparent that the Pension Plan defendants considered this to be an important policy case, that Captain Chambless was regarded as an extreme example of a "bad boy",* and that they were determined to fight to the bitter end. Accordingly, it was necessary to represent the plaintiffs in a way that would keep open alternative strategies and theories.

48. Based on the tendency of the courts to sustain action of pension plan trustees, it is estimated that the likelihood of success in challenging such action as both taken in bad faith and also as "arbitrary and capricious" is less than 50%. Further, as the Second Circuit observed in considering the effect of disparity of financial resources, in a somewhat different but comparable context, "Litigation on behalf of [an individual] against a financially powerful [pension plan] is notoriously difficult to bring to a successful conclusion." *Taylor v. Scarborough*, 66 F.2d 598, 591 (2d Cir. 1933).

49. This Court's finding that "there is culpability on the part of the Plan trustees" because "The principal purpose [of the Pension Plan] was to further union politics" (slip op., June 23, 1986,

* Lee, *ERISA's "Bad Boy": Forfeiture for Cause in Retirement Plans*, 9 Loy. U. Chi. L.J. 137 (1977).

at 8) is extraordinary and could not have been forecast in advance as a probable outcome of the litigation when it was undertaken. This Court's findings in *Chambless* also benefited other pension plan participants when the Eleventh Circuit referred to that decision as a reason for affirming the district court's holding in that case. *Deak v. Masters, Mates and Pilots Pension Plan*, slip op. July 15, 1987, pp. 3572, 3574 n.11, 3575 (copy annexed as exhibit G). It should be noted that the district court decision in *Deak* was dated June 5, 1985, but the affirmance by the Eleventh Circuit Court of Appeals did not occur until July 15, 1987. Thus, *Chambless* was more of a precedent for *Deak* than the other way around. Further because of the delay in *Deak*, it would have been impossible for Captain Chambless to begin collecting his pension as of October 1, 1986, as he did, had he been required to await the final outcome in *Deak*. We are advised by counsel in *Deak* that the Pension Plan's counsel indicated that they would in all probability not file a petition for certiorari, largely on the basis of the prior denial of such a petition in *Chambless*.

50. Further, of course, the punitive aspects (and therefore the effect of the Pension Plan's bad faith) were substantially greater in *Chambless* than in *Deak* because in *Deak*, there was no issue involving the reduction of the benefit, whereas, in *Chambless*, because of the denial of the wage-related provision to Captain Chambless (not involved in *Deak*), "the forfeiture carried an added penalty of halving the benefits . . . he would receive." 602 F. Supp. at 910.

50. This would imply that the risk multiple should be in the range of two to three when a plaintiff prevails in such an action, in order to equalize the amounts allowed with the rates charged by counsel (such as the Pension Plan's attorneys) without regard to ultimate success.

51. Applicant's request of a risk multiple of 1.5 therefore is reasonable and in part reflects the fact that attorney's fees will not be paid on all of the time expended because plaintiffs did not prevail on all of their claims. The amount of the time that has been eliminated for the purpose of this application if 2582

hours having a value of approximately \$236,673.62 (using the mixed rate noted above) as shown in the analysis made by Mr. Pelton.

53. In point of fact, defendants had no legitimate reasons for adopting Amendment 47. Indeed, as found by this Court, the purpose was for defendants to pursue its scheme of discriminating against the older, licensed deck officers by pointing to the rules when offering plan participants the "Hobson's Choice" of either accepting lower paying jobs or forfeiting the right to receive a pension by seeking employment outside of the union. 602 F. Supp. at 911-13. Such action by pension plan trustees coupled with this Court's finding that the pension benefit itself was halved as "an added penalty" (602 F. Supp. at 910), and that Captain Chambliss "was treated badly to serve . . . political purposes" in furtherance of "union politics" (slip op., June 23, 1986, at 3, 6), is morally culpable to a high degree.

WHEREFORE, attorneys' fees and expenses should be allowed for the plaintiffs pursuant to the calculations shown above. A hearing on this application is requested. Once the Court determines the time and expenses to be allowed, and the hourly and interest rates to be used, it is requested that the Court authorize counsel to submit an order on notice setting forth the relevant computations and amounts based thereon.

Dated: New York, New York
August 17, 1987

Respectfully submitted,

WISEHART & KOCH

By: /s/ Arthur M. Wisheart

Arthur M. Wisheart

25 West 43rd Street, Suite 1114
New York, New York 10036
(212) 730-0044

Attorneys for Plaintiffs

AFFIDAVIT OF ARTHUR M. WISEHART, ESQ., IN
RESPONSE TO CONTENTIONS RAISED IN DEFENDANTS'
PAPERS IN OPPOSITION, DATED NOVEMBER 13, 1987

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

_____	x
	:
ARTHUR CHAMBLESS and	:
MILDRED H. CHAMBLESS,	: 80 Civ. 4258 (RLC)
	:
Plaintiffs,	:
	:
— against —	: AFFIDAVIT OF
	: ARTHUR M. WISEHART
	:
MASTERS, MATES & PILOTS	:
PENSION PLAN, et al.,	:
	:
Defendants.	:
_____	x

STATE OF NEW YORK)	
)	ss.:
COUNTY OF NEW YORK)	

ARTHUR M. WISEHART, being duly sworn, deposes and
says:

1. I am a member of the Bar of this Court and of the firm
of WISEHART & KOCH, attorneys for the plaintiffs herein.

2. This affidavit is respectfully submitted in response to cer-
tain of the contentions contained in the papers submitted by
the Pension Plan defendants in opposition to plaintiffs' applica-
tion for allowances for fees and expenses pursuant to Section
502(g)(1) of ERISA (29 U.S.C. § 1132(g)(1)).

3. Defendants' memorandum takes issue with time expended in certain areas or with regard to certain activities at pages 23-25. Based upon my personal knowledge of the issues in dispute and the activities involved, I find that defendants' contentions are unwarranted:

* * * * *

4. The Counsel for the Pension Plan defendants had written a letter dated September 9, 1987 in which additional information regarding the fee application was requested. A copy of that letter is annexed hereto as Exhibit A. By a letter of September 23, 1987 (Exhibit B annexed hereto), well before the Pension Plan's brief was served on October 2, 1987, we responded to the Pension Plan's request for information.

5. At the time that Ms. Plevan requested that we provide additional information, in a telephone call shortly before Labor Day, she indicated that if we provided certain additional information, we would then get together and discuss the possibility of settlement. However, after our letter of September 23, 1987, I heard nothing further from Ms. Plevan on that subject. Accordingly, I called her after the Pension Plan's answering papers had been filed. Although she apologized for not having called, and admitted that she should have done so, she made it clear

that the Pension Plan defendants were not interested on settling on any reasonable basis. At no time throughout this litigation have the Pension Plan defendants ever evinced the slightest interest in settling or have their counsel indicated any interest in pursuing the subject informally, although we have made continuing inquiries relating thereto.

6. By reason of an item in the *New York Law Journal* we learned of the decision of Judge Sweet dated October 9, 1987 in *Sokolowski v. Aetna Life & Casualty Co.*, 84 Civ. 4801. We were not told of that ruling by defendants despite the clear materiality of that decision to the claims of the plaintiffs herein for attorneys' fees, costs and expenses. The *Sokolowski* case indicates that the Pension Plan defendants will be able to recover all of their own legal fees and expenses under the Aetna policy, as well as those which we may recover in this proceeding. In view of the fiduciary relationship between the Pension Plan defendants and Captain Chambless, it is clear that the non-disclosure of this litigation was a serious breach of their obligations as fiduciaries as well as an imposition on this Court. The obdurate position that the Pension Plan defendants have taken throughout in refusing even to discuss the possibility of settlement, has helped to run this case into fantastic amounts of money. To avoid disclosing that defendants' own legal expenses were covered under an insurance policy in such circumstances shows bad faith at a minimum.

7. Further, the court records in the *Sokolowski* case show that attorneys' fees and litigation expenses incurred by the Plan in defending the *Chambless* action through January 31, 1987 came to \$786,702.98. This astonishing figure which the Pension Plan undoubtedly paid on a current basis, coupled with the amounts paid in the *Deak* case, shows that the Pension Plan defendants were willing to pay out over a million dollars in attorneys' fees and expenses in order to litigate issues that they knew had no merit but which this Court found were pursued solely as a matter of union politics. This can only be considered to be harassment directed toward those to whom the Pension Plan defendants had fiduciary duties, a harassment that they felt they were free to

engage in with impunity because of the coverage of an insurance policy regarding their own attorneys' fees and expenses.

8. The fact that the Pension Plan attorneys received almost \$800,000 in attorneys' fees and expenses in this action alone is indicative of the bad faith involved in the assertion at pages 32-33 of their memorandum that the plaintiffs could have prosecuted this case by expending only 455 hours. Further, the Pension Plan had the benefit of allied attorneys who served as counsel for the Union such as Mr. Epstein, the author of Amendment 47, and others whose time in all probability was not billed to the Pension Plan.

9. Promptly after having received the decision in the *Sokolowski* case, we served on defendants' counsel our document requests dated October 20, 1987 (Exhibit C annexed hereto).

10. We have not as yet received any response to the document requests. However, it is clear that a hearing will be required in this case and we respectfully request that it be set as a date following the supplying of the information requested in plaintiffs' document requests.

11. It is worthy of note that certain of the exhibits involved in the *Sokolowski* case, namely the Pension Plan's Exhibits 79, 81, and 83, appear to bear directly on the legal fees and expenses billed by counsel for the Pension Plan defendants in the *Chambless* action. The exhibits are clearly relevant to the contentions of the defendants herein and accordingly, on November 2, 1987, we requested that the Pension Plan defendants produce copies thereof, as these were public documents from an action that had already been tried in the Court. (The request for said documents is annexed hereto as Exhibit D.) However, the Pension Plan defendants' counsel refused to produce said documents to me when I called on November 12, 1987, and requested that they be made available before our response herein is required. We therefore request an order directing that said documents be produced forthwith.

12. Finally, it appears that the Pension Plan defendants in this case have been directly involved in massive breaches of fiduciary

duty. In *Lowen, et al. v. Tower Asset Management, Inc., et al.*, Docket Nos. 87-7205, 87-7289, the Second Circuit Court of Appeals affirmed orders by Judge Broderick that the Pension Plan's consultants disgorge over a million dollars in monies expended involving clear breaches of fiduciary duty. It appears that millions of other dollars under the management of these same fiduciaries is also involved and subject to further claims. Tower Asset Management and related companies were given a total of \$30 million dollars of assets including \$6.5 million of Pension Plan assets in November 1984. By early 1985 the value of these assets had been reduced to \$9 million in view of risky ventures mostly involving companies in the maritime industry, according to the opinion of the Second Circuit Court of Appeals. It is stated that the Secretary of Labor has brought a similar action against those who selected Tower Management, Tower's owners and the trustees of the Pension Plan. According to the Second Circuit Court of Appeals, there was "overwhelming evidence" of kickbacks. (Slip op. at 5324.) We are informed that a criminal investigation is also underway. While Mr. Lowen, the Union president whom the Pension Plan relied upon chiefly as a witness in this litigation, is the putative plaintiff in the action against Tower Asset Management, we are informed that he himself was directly involved in the selection of Tower and participated in connection with its investment decisions. Undoubtedly more is yet to come in the aftermath of the *Tower* decision.

13. The Pension Plan defendants and their counsel herein have shown that they know how to sue third parties on claims that they abused their powers as fiduciaries when receiving approximately \$1 million in fees and must make restitution. It is now time that they be compelled to sue those among their own number who are not third parties but are expressly called "Trustees" and charged with fiduciary duties under ERISA. It is established under the findings of this Court that the union trustees foisted off on this pension plan amendments in bad faith that had only the self-serving purpose of furthering union politics. These same union trustees undoubtedly are also responsible for the unyielding, extended litigation centered on the very

same bad faith amendments as to which the Pension Plan's attorneys have been paid \$1,000,000, in order to teach a lesson to "bad boys" like Captain Chambless, who seek to litigate their rights in opposition to a scheme that had its genesis in bad faith. The Pension Plan's law firm, that has been recognized for many years as a leading firm representing management interests in this same pension plan, and has profited substantially from this litigation, is chargeable with having known from the very outset that the pension plan amendments in whose interests it litigated were grounded in considerations having nothing to do with the financial integrity of the pension plan, but were the outgrowth of union politics. These same counsel had to know that what they repeatedly told the Court that the case was about nothing more than a fiction, as they continued to conduct a litigational war of attrition, believing that they could escape unscathed with the knowledge that their fees and expenses would be paid not from the plan's assets but would be covered by an insurance policy the existence of which they concealed from the plaintiffs. The hypocrisy of the Pension Plan defendants in their opposition to plaintiffs' application therefore stands exposed before the Court, and should be rejected as such. As in the *Lowen* case, restitution of the \$1,000,000 they have received should be merely a starting point of the relief to be provided in the interest of justice. See *Donovan v. Daugherty*, 550 F. Supp. 390, 410-411 (S.D. Ala. 1982), cited with approval in the Second Circuit's opinion in *Lowen v. Tower Asset Management, Inc.*, ____ F.2d ____ (2d Cir. Dkt. 87-7205, 9-17-87), for the principle that the "plan's attorney, who was not ERISA fiduciary, found liable for trustee's fiduciary violation because he participated in and was enriched by their decisions."

14. In view of all of these circumstances, we submit that the Pension Plan defendants should be required to pay plaintiffs reasonable fees and expenses forthwith and the Pension Plan itself be directed to start immediate proceedings against the Union trustees responsible for the foisting of Amendments 46 and 47 off on the Pension Plan trustees based upon the findings of this Court that said Amendments were adopted without regard to the financial factors and solely as a matter of pursuing union

politics. See *Donovan v. Daugherty*, 550 F. Supp. 390, 410-11 (S.D. Ala 1982).

Respectfully submitted,

/s/ Arthur M. Wisehart

Arthur M. Wisehart

Sworn to before me this 13th
day of November 1987:

/s/ Janet R. Sussman

Notary Public

AFFIDAVIT OF ARTHUR M. WISEHART, ESQ., IN
SUPPORT OF MOTION, DATED AUGUST 3, 1988

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

_____		x
		:
ARTHUR CHAMBLESS and	:	
MILDRED H. CHAMBLESS,	:	80 Civ. 4258 (RLC)
	:	
Plaintiffs,	:	
	:	
against —	:	AFFIDAVIT OF
	:	ARTHUR M. WISEHART
	:	
MASTERS, MATES & PILOTS	:	
PENSION PLAN, et al.,	:	
	:	
Defendants.	:	
_____		x

STATE OF NEW YORK)	
)	ss.:
COUNTY OF NEW YORK)	

ARTHUR M. WISEHART, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court and of the firm of WISEHART & KOCH, attorneys for the plaintiffs herein.

2. This affidavit is respectfully submitted in support of plaintiff's motion for an order altering, amending, and clarifying the opinion of this Court dated July 20, 1988, and making certain findings with respect thereto.

3. One purpose of the motion is to specify that interest shall be computed and paid on the difference between the pension benefit that has been paid to Captain Chambless since October 1, 1986, and the benefit computed as order by the Court, pursuant to 28 U.S.C. § 1961.

4. The motion also seeks to make it clear that defendant is obligated to pay said difference in the amount of the benefit beginning with October 1, 1986 to present.

5. Similarly, since the judgment herein is dated October 29, 1984, plaintiff seeks a determination that interest on the amount allowed as plaintiff's attorney's fees and reimbursable costs and expenses shall be paid at least from that date, also pursuant to the mandatory requirements of 28 U.S.C. § 1961.

6. Further, plaintiff requests that interest on pre-judgment amounts be reconsidered and asserts that denial of such interest is inconsistent both with the legislative purpose in enacting 29 U.S.C. § 1132(g)(1) and also is inconsistent with New York law as embodied in CPLR § 5001 as well as Fed.R.Civ.P. 54(c) ("Every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled").

7. For similar reasons, plaintiff requests reconsideration of this Court's denial of reimbursement to plaintiff for all reasonable expenses incurred by him or on his behalf in connection with this litigation. Based upon the personal knowledge of the undersigned, this is to affirm that but for the existence of this litigation, and the necessities of pursuing plaintiff's claims, or reasonably responding to defendants' contention, said expenses as set forth in plaintiff's Application, dated August 17, 1987, would not have been incurred.

8. The personal expenses incurred by Captain Chambless in coming to New York for the purpose of conferring in regard to this litigation, or prosecuting it, were necessary in order for the litigation to be successfully prosecuted.

9. The litigation was commenced in the Southern District of New York because, at the time it was commenced, defendants' offices and files and principal witnesses were located here, in New York City. The defendants therefore saved substantially on amounts that would have been required for travel and expenses had the litigation been commenced elsewhere. The amount of expenses requested by plaintiff is much less than the savings that

the defendants obtained by reason of the location of the litigation in a place convenient to them, and reimbursement of plaintiff's expenses should be granted as a matter of equity.

10. Plaintiff seeks to amend and clarify this Court's order to include allowances for attorneys' fees and expenses in connection with the motion for determination of the amount of the pension benefit in the services in connection with the preparation and filing for plaintiff's attorney's fees and expenses which (as noted in the footnote on page 15 of said application) had not been included at the time the application was made.

11. Further, as shown in the affidavit of Paula C. Rowe annexed hereto, the Court incorrectly excluded the time of certain attorneys shown in plaintiff's application as having a value of \$17,487.25. Correction of the Court's opinion in that respect, therefore, is requested.

12. The affidavit of Dr. S. Ramanujam annexed hereto shows that the attorney's fees, costs and expenses allowed should be adjusted to that the hourly rates for professional services and reimbursable costs and expenses have a present value that equals the hourly rate applicable for the year in which the services were performed or the expenditures were made, as the case may be.

13. The Pension Plan's liability to pay the attorney's fees, costs and expenses awarded to plaintiff in this litigation is covered by insurance paid for by the assets of the pension plan, as established in *Sokolowski v. Aetna Life & Casualty Co.*, 84 Civ. 4801 (RWS), referred to in paragraphs 6-8 of the affidavit of the undersigned dated November 13, 1987. The opinion of *Sokolowski* dated October 9, 1987, finds that the pension plan defendants are entitled to recover all of their legal fees, costs and expenses in connection with this litigation including those of plaintiff. With respect to insurance that was paid from fund assets, coverage for the plaintiff's legal fees and expenses should be on a parity with those for defendants' legal fees and expenses, with an adjustment to reflect the fact that such fees and expenses for defendants were paid on a *current* basis when the services were rendered or the expenses paid.

14. This Court apparently overlooked plaintiff's prior request that defendants be ordered to make disclosure of the factual basis for their claim in *Sokolowski* for attorney's fees and expenses of their own totaling \$786,702.98 through January 31, 1987 (Wisehart Affidavit ¶¶ 9-11), and the motion herein therefore requests that such disclosure be ordered.

15. We are informed by the court that the *Sokolowski* case has now been settled and closed, so there can now be no question regarding the liability of the insurance company on the policy therein for reimbursement of defendants for *all of plaintiff's attorney's fees and costs and expenses of litigation as awarded by this court*. Further, as shown in Exhibit A annexed hereto, defendants recovered their fees at "big firm" rates *plus* reimbursement of expenses. In addition, they received prejudgment interest thereon. Plaintiff should recover on the same basis.

16. The deliberate and malicious action of the pension plan defendants to use proceeds of the insurance policy to which Captain Chambless is a third party beneficiary to pay their own legal fees and expenses for the purpose of depriving, blocking and restricting him of his rights thereunder constitutes a further breach of their fiduciary duties under Section 404(a)(1)(A) of ERISA (29 U.S.C. § 1104).

17. Based on personal knowledge, I know that the expenses and billing rates that are contained in the plaintiff's fee application herein are consistent with the practices of this firm in other matters. Moreover, based upon my knowledge as Assistant General Counsel of one large corporation (American Airlines, 1959-1969) and General Counsel of another (REA Express, Inc., 1969-1974) responsible for reviewing statements for services rendered by outside counsel, I know that the practice of such counsel in New York and elsewhere is to bill for reasonable expenses incurred on the same basis as is set forth in the instant fee application.

18. Finally, we respectfully request that the decision of July 20, 1988 be amended to defer the filing of plaintiff with respect to his supplementary showing for reimbursable expenses and

further attorney's fees from the 20-day period specified in said opinion to a date that is on or before sixty (60) days after determination of this motion.

19. This request is based in part upon the belief that the expenditure of time required for such additional filings would be lessened after the determination of this Court with respect to the matters raised in this motion, rather than before.

20. The request is also based upon the fact that, at the present time, in view of the summer vacation schedule, as well as the workload of this office, substantial additional time is required in order to submit the further information entailed.

WHEREFORE, plaintiff's motion should be granted.

Respectfully submitted,

/s/ Arthur M. Wisehart

Arthur M. Wisehart
WISEHART & KOCH
25 West 43rd Street
New York, New York 10036

Attorneys for Plaintiff

Sworn to before me this 3rd
day of August, 1988:

/s/ Kirk L. Bigelow

Notary Public

EXHIBIT A, ANNEXED TO WISEHART AFFIDAVIT

Affidavit of Katherine Raymond in *Sokolowski v. Aetna Life & Casualty Co.*, No. 84 Civ. 4801 (RWS) explaining how Proskauer Rose Goetz & Mendelsohn calculated defense costs, dated November 30, 1987.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

_____	x	
	:	
JOHN F. SOKOWLOWSKI, as	:	
Administrator and on behalf of	:	80 Civ. 4801 (RSW)
the M.M. & P. PENSION PLAN,	:	
	:	
Plaintiff,	:	
	:	
— against —	:	AFFIDAVIT OF
	:	KATHERINE RAYMOND
	:	
AETNA LIFE & CASUALTY	:	
COMPANY,	:	
	:	
Defendant.	:	
_____	x	
STATE OF NEW YORK)	
)	ss.:
COUNTY OF NEW YORK)	

KATHERINE RAYMOND, being duly sworn, deposes and says:

1. I am associated with the firm of Proskauer Rose Goetz and Mendelsohn, attorneys for plaintiff. I make this affidavit to explain how plaintiff arrived at the defense cost and prejudgment interest figures set forth in the proposed judgment submitted to the Court by plaintiff.

2. Schedules showing the legal fees and litigation expenses billed to and paid by the MM&P Pension Plan (the "Plan") for

the *Deak* and *Chambless* actions is annexed as Exhibit A. These schedules, which have already been submitted to the Court as trial exhibits 78 through 81, show that the total amount incurred by the Plan in defending both actions through January 31, 1987 was \$999,856.91.

3. Following the Court's October 9, 1987 order directing the entry of judgment, I spoke on several occasions with William Mait, Esq., attorney for Aetna. Mr. Mait brought to my attention certain instances where legal fees were billed to the Plan for work on *Deak* or *Chambless* where the fees related only indirectly to one of those cases. Based on my conversations with Mr. Mait, reductions were made from the billed amounts set forth in Exhibit A to omit from the proposed judgment attorney's fees that arguably should not be borne by Aetna. These reductions were made on the following bills:

<i>Deak</i>	Hamilton & Douglas bills 5/13/80, 7/11/80, 9/12/80, 3/11/81, 6/8/81, 7/8/81, 9/18/81, 11/13/81, 2/5/82, 5/5/82, 12/8/82, 7/11/83, 7/11/84, 4/7/86
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<i>Chambless</i>	Proskauer bills 5/17/82, 9/24/82, 5/17/83, 5/9/84, 8/22/84
------------------	--

The sum total of these reductions were \$6,214.08, resulting in a total reduction in legal fees from \$999,856.91 to \$993,642.83.

4. The proposed judgment also includes \$358,238.59 in pre-judgment interest through November 30, 1987. The interest calculation is set forth in a table annexed as Exhibit B hereto. As the table reflects, the \$358,238.59 amount was arrived at by multiplying (1) the amount of each payment for legal fees or litigation expenses made by the Plan for the defense of the *Deak* or *Chambless* action by (2) the number of years from the payment date to January 31, 1987 by (3) the 9% New York statutory rate for prejudgment interest set forth in CPLR §5004.

Thereafter, an additional \$71,675.70 in interest was added to cover interest on all the payments for the period January 31, 1987 to November 30, 1987. Finally, \$460.74 was added which constitutes interest on a payment of legal fees in the *Chambless* action made on October 5, 1987.

/s/ Katherine Raymond

Katherine Raymond

Sworn to before me this 30th
day of November 1987

/s/ Beverly Walker

Notary Public